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# Maryland Reports.

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VOLUME LII.



2

REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN THE  
*Court of Appeals of Maryland.*

J. SHAAFF STOCKETT,  
STATE REPORTER.

VOL. LII.

CONTAINING CASES IN APRIL AND OCTOBER TERMS, 1879.

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## NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

### OF THE COURT OF APPEALS.

HON. JAMES LAWRENCE BARTOL, Chief Judge.  
 HON. LEVIN THOMAS HANDY IRVING, Associate Judge.  
 HON. JOHN MITCHELL ROBINSON, Associate Judge.  
 HON. RICHARD GRASON, Associate Judge.  
 HON. RICHARD HENRY ALVEY, Associate Judge.  
 HON. OLIVER MILLER, Associate Judge.  
 HON. RICHARD JOHNS BOWIE, Associate Judge.  
 HON. GEORGE BRENT, Associate Judge.

### OF THE CIRCUIT COURTS.

**FIRST JUDICIAL CIRCUIT.**—*Worcester, Somerset, Dorchester and Wicomico Counties.*

HON. LEVIN THOMAS HANDY IRVING, Chief Judge.  
 HON. EPHRAIM K. WILSON, Associate Judge.  
 HON. CHARLES F. GOLDSBOROUGH, Associate Judge.

**SECOND JUDICIAL CIRCUIT.**—*Caroline, Talbot, Queen Anne's, Kent and Cecil Counties.*

HON. JOHN MITCHELL ROBINSON, Chief Judge.  
 HON. JOSEPH A. WICKES, Associate Judge.  
 HON. FREDERICK STUMP, Associate Judge.

**THIRD JUDICIAL CIRCUIT.**—*Baltimore and Harford Counties.*

HON. RICHARD GRASON, Chief Judge.  
 HON. GEORGE YELLOTT, Associate Judge.  
 HON. JAMES D. WATTERS, Associate Judge.

**FOURTH JUDICIAL CIRCUIT.**—*Allegany, Garrett and Washington Counties.*

HON. RICHARD HENRY ALVEY, Chief Judge.  
 HON. GEORGE A. PEARRE, Associate Judge.  
 HON. WILLIAM MOTTER, Associate Judge.

vi NAMES OF THE JUDGES, &c.

FIFTH JUDICIAL CIRCUIT.—*Carroll, Howard and Anne Arundel Counties.*

HON. OLIVER MILLER, Chief Judge.

HON. EDWARD HAMMOND, Associate Judge.

HON. WILLIAM N. HAYDEN, Associate Judge.

SIXTH JUDICIAL CIRCUIT.—*Montgomery and Frederick Counties.*

HON. RICHARD JOHNS BOWIE, Chief Judge.

HON. JOHN A. LYNCH, Associate Judge.

HON. W. VEIRS BOUIC, Associate Judge.

SEVENTH JUDICIAL CIRCUIT.—*Prince George's, Charles, Calvert and St. Mary's Counties.*

HON. GEORGE BRENT, Chief Judge.

HON. ROBERT FORD, Associate Judge.

HON. DANIEL R. MAGRUDER, Associate Judge.

EIGHTH JUDICIAL CIRCUIT —*Baltimore City.*

THE SUPREME BENCH OF BALTIMORE CITY.

HON. GEORGE WILLIAM BROWN, Chief Judge.

HON. GEORGE W. DOBBIN, Associate Judge.

HON. HENRY F. GAREY, Associate Judge.

HON. CAMPBELL W. PINKNEY, Associate Judge.

HON. ROBERT GILMOR, Associate Judge.

The Judges of the Supreme Bench were assigned to the following Courts under an order which took effect on the second Monday of September, 1878:

SUPERIOR COURT.—HON. GEORGE W. DOBBIN with HON. ROBERT GILMOR, to assist.

COURT OF COMMON PLEAS.—HON. GEORGE WILLIAM BROWN with HON. GEORGE W. DOBBIN, to assist.

CITY COURT.—HON. HENRY F. GAREY, with HON. CAMPBELL W. PINKNEY, to assist.

CIRCUIT COURT.—HON. ROBERT GILMOR, with HON. HENRY F. GAREY, to assist.

CRIMINAL COURT.—HON. CAMPBELL W. PINKNEY, with HON. GEORGE WILLIAM BROWN, to assist.

---

ATTORNEY GENERAL.

CHARLES J. M. GWINN, Esq.

---

CLERK.

JAMES S. FRANKLIN, Esq.

\*SPENCER C. JONES, Esq.

\* Elected on the 4th of November, 1878, and qualified on the 2nd of December following.



# NAMES OF THE CASES

REPORTED IN THIS VOLUME.

Appleman, Alpheus R. <i>ats.</i> John Thompson Troup.....	456
Baltimore and Hampden Passenger Railway Company, <i>et al.</i> <i>ats.</i> Philip Hanson Hiss and Wife, <i>et al.</i> .....	242
Baltimore County Marble Company, <i>et al.</i> <i>ats.</i> John M. Miller....	642
Bantz, Ex'r, Gideon <i>vs.</i> William S. Bantz, <i>et al.</i> .....	686
Bantz, <i>et al.</i> , William S. <i>ats.</i> Gideon Bantz, Ex'r.....	686
Bechtel, John W. <i>vs.</i> Joseph M. Cone.....	698
Boyle, Charles B. <i>vs.</i> Jonathan Schindel.....	1
Bozman, Thomas <i>ats.</i> James R. Willing and Affra D. Mezick....	44
Buschman, J. D. E. and Sylvester Cook <i>vs.</i> William H. Codd....	202
Charlton, Mary C. <i>ats.</i> Eliza J. and Stansberry S. Neal, <i>et al.</i> ....	495
Codd, William H. <i>ats.</i> J. D. E. Buschman and Sylvester Cook....	202
Cone, Joseph M. <i>ats.</i> John W. Bechtel.....	698
Conner, Ex'rx, Eleanor F. T. <i>vs.</i> Rachel Waring, <i>et al.</i> .....	724
Conway, Charles H. <i>vs.</i> The Log Cabin Permanent Building Asso- ciation, &c.....	136
Cooke, Arietta and Israel <i>ats.</i> Mary G. Worthington.....	297
Crenshaw, &c., William G. <i>vs.</i> Daniel W. Slye.....	140
Culbertson, Samuel <i>ats.</i> Martha McD. Smith.....	628
Davis, Henry S. <i>vs.</i> Richard M. Hall.....	678
Dietz, Pauline <i>ats.</i> The Knickerbocker Life Insurance Company of the City of New York.....	16
Dodge and others, Trustees, Francis <i>ats.</i> Lewis G. Stanhope and James R. McLaughlin.....	483
Dougherty, James M. <i>vs.</i> John B. Piet, &c.....	425
Drexel, Morgan & Co. Appeal of.....	520
Engle, Peter and Charles C. <i>ats.</i> The Planters' Mutual Insurance Company of Washington County.....	468

Eshleman, Daniel <i>ats.</i> Israel Reiff, <i>et al.</i> .....	582
Estep, John C. and Margaret P. Shaw <i>vs.</i> William D. Mackey, <i>et al.</i>	592
Evans, David <i>vs.</i> Elizabeth Horan and Eliza Preston.....	602
Fickey, Jr., Frederick <i>ats.</i> Charles Weber.....	500
First National Bank of Hagerstown, Garnishee <i>vs.</i> Susan Weckler.	30
Foutz, David E. <i>ats.</i> Edmund T. H. Walter and Wife.....	147
Franklin Bank of Baltimore <i>vs.</i> Edward Lynch.....	270
Gardenville Permanent Loan Association <i>vs.</i> Maria S. Walker...	452
Garrett & Sons. Appeal of Robert.....	520
Geekie, Charles W. <i>vs.</i> William B. Harbourd.....	460
Gill, Ansley and James McMahon <i>vs.</i> William F. Weller.....	8
Gill, Ansley and James McMahon <i>vs.</i> Henry Vogler.....	668
Hack and others, Oliver F. <i>ats.</i> George E. Sangston and others, Adm'ces.....	178
Hall, Richard M. <i>ats.</i> Henry S. Davis.....	678
Hambleton, Trustee, Samuel <i>ats.</i> Mary J. Johnson.....	378
Harbourd, William B. <i>ats.</i> Charles W. Geekie.....	460
Harryman, John G. and Edson M. M. Schryver <i>vs.</i> Albert D. Roberts.....	64
Hartsock, H. H. <i>vs.</i> William E. Russell.....	619
Harvey. Appeal of Joshua G.....	520
Higgins, <i>et al.</i> , Edward <i>ats.</i> Sanford J. Lewis.....	614
Hiss and Wife, <i>et al.</i> , Philip Hanson <i>vs.</i> The Baltimore and Hampden Passenger Railway Co., <i>et al.</i> .....	242
Horan, Elizabeth and Eliza Preston <i>ats.</i> David Evans.....	602
Horst, Anna <i>ats.</i> Israel Reiff, <i>et al.</i> .....	582
Horst, Samuel E. <i>ats.</i> Israel Reiff, <i>et al.</i> , Trustees.....	255
James, Watkins <i>vs.</i> Isaac N. Rowland.....	462
Johns Hopkins University <i>vs.</i> George H. Williams, Ex'r, and others.....	229
Johns, John T. <i>vs.</i> John Marsh.....	328
Johnson, Mary J. <i>vs.</i> Samuel Hambleton, Trustee, <i>et al.</i> .....	378
Johnson, Mary Clare and W. N. B. <i>vs.</i> Alexander T. Johnson, <i>et al.</i>	668
Johnson, <i>et al.</i> , Alexander T. <i>ats.</i> Mary Clare and W. N. B. John- son.....	668
Jones, Garnishee, Edwin L. <i>vs.</i> Martha V. and Robert Syer.....	211

# NAMES OF THE CASES.

ix

Kremelberg, Gertrude J. <i>vs.</i> John D. Kremelberg.....	553
Kremelberg, John D. <i>ats.</i> Gertrude J. Kremelberg.....	558
Knickerbocker Life Insurance Company of the City of New York <i>vs.</i> Pauline Dietz.....	16
Lange, George and Adam Appel <i>vs.</i> Frantz Wagner.....	310
Lazear, Jesse <i>vs.</i> The National Union Bank of Maryland.....	78
Leiman, George W. <i>ats.</i> William H. Weaver.....	708
Lewis, Sanford J. <i>vs.</i> Edward Higgins.....	614
Log Cabin Permanent Building Association, &c. <i>ats.</i> Charles H. Conway.....	136
Lynch, Edward <i>ats.</i> The Franklin Bank of Baltimore.....	270
Mackey, <i>et al.</i> , William D. <i>ats.</i> John C. Estep and Margaret P. Shaw.....	592
Mackubin, Trustee, James <i>ats.</i> Ellen and John C. Mahoney.....	357
Mahoney, Ellen and John C. <i>vs.</i> James Mackubin.....	357
Marsh, John <i>ats.</i> John T. Johns.....	323
Maurice, Bernard <i>vs.</i> John L. Worden.....	283
Mayor and City Council of Baltimore <i>ats.</i> The State of Maryland.	398
Mayor and City Council of Baltimore <i>vs.</i> Daniel Stoll.....	485
Mayor and City Council of Baltimore, &c. <i>vs.</i> Jeremiah Weatherby, <i>et al.</i> .....	442
McShane, John and Henry <i>ats.</i> Patrick Murray.....	217
Miller, Mary <i>ats.</i> Abraham B. Patterson.....	388
Miller, John M. <i>vs.</i> The Baltimore County Marble Company, <i>et al.</i>	642
Murray, Patrick <i>vs.</i> John and Henry McShane.....	217
National Union Bank of Maryland <i>ats.</i> Jesse Lazear.....	78
Neal, <i>et al.</i> Eliza J. and Stansberry S. <i>vs.</i> Mary C. Charlton.....	495
Patterson, Abraham B. <i>vs.</i> Mary Miller.....	388
Perot, Trustee and others. Appeal of William H.....	520
Piet, &c., John B. <i>ats.</i> Charles M. Dougherty.....	425
Planters' Mutual Insurance Company of Washington County <i>vs.</i> Peter and Charles C. Engle.....	468
Pressman, George <i>vs.</i> John Silljacks.....	647
Rayner, Smith <i>vs.</i> The State of Maryland.....	368
Reiff, <i>et al.</i> , Trustees, Israel <i>vs.</i> Samuel E. Horst.....	255

Reiff, <i>et al.</i> Israel <i>vs.</i> Daniel Eshleman.....	582
Reiff, <i>et al.</i> Israel <i>vs.</i> Anna Horst.....	582
Ridgely, Jr., <i>et al.</i> , Ex'rs, James L. <i>ats.</i> Joshua F. C. Worthington.	349
Roberts, Albert D. <i>ats.</i> John G. Harryman and Edson M. M. Schryver.....	64
Rowland, Isaac N. <i>ats.</i> Watkins James.....	462
Russell, William E. <i>ats.</i> H. H. Hartsock.....	619
Sabel, &c., Henrietta J. <i>vs.</i> Fielder C. Slingluff, &c.....	132
Sangston and others, Adm'ces, George E. <i>vs.</i> Oliver F. Hack and others.....	173
Schindel, Jonathan <i>ats.</i> Charles B. Boyle.....	1
Silljacks, John <i>ats.</i> George Presstman.....	647
Slingluff, &c., Fielder C. <i>ats.</i> Henrietta J. Sabel, &c.....	132
Slye, Daniel W. <i>ats.</i> William G. Crenshaw, &c.....	140
Smith, Martha McD. <i>ats.</i> Samuel Culberston.....	628
Stanhope, Lewis G. and James R. McLaughlin <i>vs.</i> Francis Dodge and others, Trustees.....	483
State of Maryland <i>ats.</i> Smith Rayner.....	368
State of Maryland <i>vs.</i> The Mayor and City Council of Baltimore.	398
State of Maryland <i>vs.</i> Thomas Wilson, President of the Baltimore Cemetery Company.....	688
Stoll, Daniel <i>ats.</i> The Mayor and City Council of Baltimore....	435
Stonebraker, George M. <i>vs.</i> Henry F. Zollickoffer.....	154
Sumwalt, Elizabeth <i>vs.</i> Samuel Sumwalt, <i>et al.</i> .....	338
Sumwalt, Samuel <i>ats.</i> Elizabeth Sumwalt, <i>et al.</i> .....	338
Syer, Martha V. and Robert <i>ats.</i> Edwin L. Jones, Garnishee....	211
Troup, John Thompson <i>vs.</i> Alpheus R. Appleman.....	456
Vogler, Henry <i>ats.</i> Ansley Gill and James McMahon.....	663
Wagner, Frantz <i>ats.</i> George Lange and Adam Appel.....	310
Walker, Maria S. <i>ats.</i> The Gardenville Permanent Loan Associa- tion.....	452
Walter and Wife, Edmund T. H. <i>vs.</i> David E. Foutz.....	147
Waring, <i>et al.</i> , Rachel <i>ats.</i> Eleanor F. T. Conner, Ex'rs.....	724
Weatherby, <i>et al.</i> , Jeremiah <i>ats.</i> The Mayor and City Council of Baltimore, &c.....	442
Weaver, William H. <i>vs.</i> George W. Leiman.....	708

# NAMES OF THE CASES.

xi

Weber, Charles <i>vs.</i> Frederick Fickey, Jr.....	500
Weckler, Susan <i>ats.</i> The First National Bank of Hagerstown, Gar- nishee.....	30
Weller, William F. <i>ats.</i> Ansley Gill and James McMahon.....	8
Williams, Ex'r, <i>et al.</i> , George H. <i>ats.</i> Johns Hopkins University..	229
Willing, James R. and Affra D. Mezick <i>vs.</i> Thomas Bozman.....	44
Wilson, Thomas, President of the Baltimore Cemetery Company <i>ats.</i> State of Maryland.....	638
Woods, Weeks & Co. Trust Estate of.....	520
Worden, John L. <i>ats.</i> Bernard Maurice.....	283
Worthington, Mary G. <i>vs.</i> Arietta and Israel Cooke.....	297
Worthington, Joshua F. C. <i>vs.</i> James L. Ridgely, Jr., <i>et al.</i> , Exe- cutors.....	349
Zollickoffer, <i>ei al.</i> , Henry F. <i>ats.</i> George M. Stonebraker.....	154

## CASES

DECIDED DURING THE PERIOD COMPRISED IN THIS VOLUME, AND  
DESIGNATED BY THE COURT "NOT TO BE REPORTED."

ALLNUT, CHARLES E. *vs.* MARGARET ALLNUT. *Application by the Husband for a Divorce a vinculo matrimonii from his wife. Article 16, section 25 of The Code. The Decree of the Circuit Court reversed, and the cause remanded that a Decree divorcing the parties a Vinculo matrimonii may be passed.* No. 1, October Term, 1879. Recorded in Liber S. C. J., No. 1, folio 180, &c., of "Opinions Unreported."

BALTIMORE AND RANDALLSTOWN HORSE RAILWAY COMPANY, JESSE SLINGLUFF AND OTHERS *vs.* THE BALTIMORE AND LIBERTY TURNPIKE COMPANY. *Order of the Circuit Court granting an Injunction reversed and the cause remanded. It was held to be error to grant an Injunction on the mere allegations of the Bill the verity of which depends upon the contents or construction of Documents or vouchers within the control or reach of the Complainant and which he fails to exhibit.* No. 76, October Term, 1879. Recorded in Liber S. C. J., No. 1, folio 186, of "Opinions Unreported."

BOWLING, &C., FANNY G. *vs.* J. ALEXANDER PRESTON. *Action of Assumpsit by the Appellant to recover a certain sum of money from the Appellee. It was held that the Appellant had no cause of action against the Appellee, and the Judgment of the Court of Common Pleas was affirmed.* No. 3, April Term, 1879. Recorded in Liber J. S. F., No. 2, folio 93, &c., of "Opinions Unreported."

WINELAND, MARX *vs.* THOMAS G. McCULLOH. *It was agreed in this case that John Weston obtained an Insurance policy from the Aetna Insurance Company for \$800, of which \$600 was upon real estate and \$200 upon personal property, all embraced in one policy*

*issued in his name, and marked "loss, if any, payable to Thomas G. McCulloh, as his claim may appear." At and before the time of the issuing of said Policy, Weston was indebted to the Appellee in an amount exceeding \$800, which was secured by a mortgage upon the Insured real estate. It was admitted that the Appellee's claim was not a Lien upon the Insured personal property. The insured property, Real and personal, having been destroyed by Fire an attachment was sued out by the Appellant, a Judgment creditor of Weston, and the same was laid in the hands of the Insurance Company. The attaching creditor claimed that the sum of \$200 was subject to the attachment as the money of Weston. It was held by the Circuit Court that McCulloh was entitled to the \$200, and Judgment was entered accordingly. On appeal this Judgment was affirmed. No. 70, October Term, 1879. Recorded in Liber S. C. J., No. 1, folio 129 of "Opinions Unreported."*

CORRIGENDA.

- On page 171, in the eighth, as also in the fifteenth line from the bottom, for "*Shelly's*," read "*Shelley's*."
- On page 324, in the twelfth line of the *syllabus*, for "*are*," read "*is*."
- On page 350, in the eighteenth line from the bottom, for "*issue*," read "*issues*."
- On page 421, in the ninth line from the bottom, for "*particular*," read "*public*."
- On page 500, strike out the word "*said*," in the fourth line of the *catch words*.
- On page 592, in the first line of the *syllabus*, for "*sec. 29*," read "*sec. 27*."
- On page 611, in the ninth line from the top, for "*433*," read "*443*."
- On page 611, in the twelfth line from the top, for "*1776*," read "*1766*."





# In Memoriam.

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## Court of Appeals,

TUESDAY, Eleventh of January, 1881.

DURING the session of the Court to-day, the following proceedings were had:

The Hon. WILLIAM H. TUCK, formally announced the death of the late Judge BRENT.

### MAY IT PLEASE THE COURT:

Having been for a long time intimately acquainted with the honored personage of whom I am about to speak, I crave audience of your Honors at this pause of business, to make formal announcement of the sad event, of which you have already had notice through the public prints, and by which, for a third time, a vacancy has occurred on this Bench since its organization under the present Constitution.

Hon. GEORGE BRENT, departed this life on Thursday, the 6th instant, at his home in Charles County, after a long illness. This event was not unexpected, yet it is none the less sad to realize that we shall know him no more in his accustomed seat among your Honors. I am not here to speak in terms of extravagant eulogy of one so well known to us all, but only to place on the records of the Court, in whose work he has participated for thirteen years, a brief memorial of a most excellent man, and faithful public servant, of whom those who knew him most intimately, think that too much cannot be said.

Descended, on both sides, from ancestors who were among the earliest settlers in that part of the State, he was born in September, 1817, in Charles County. Having

completed his education at George Town College, he studied law with his uncle, WILLIAM L. BRENT, a distinguished member of the Bar in Washington, and returned to his native County to commence a successful professional career. At that time it was the custom for lawyers to "ride the circuit;" and in that way I made his acquaintance at Port Tobacco, and frequently met him at the regular terms of Court in that Judicial District. I recall with the utmost pleasure, bright memories of those times in my own professional life, and the men whom it was my good fortune then to meet at the Bar, and in social intercourse, nearly all of whom have been summoned by that messenger that comes to each of us but once, and will take no denial. In that Court, and amidst such lawyers, a young man must needs have received a proper training, and learned much of the law of Evidence, Pleading and Practice, which knowledge, in the case of Judge BRENT, was so readily availed of when he came to the Bench. In 1840, and again in 1841, we met in the Legislature; his colleagues the first session were General JOHN MATHEWS, and JOHN D. BOWLING; in the second he was associated with General MATHEWS, and PETER W. CRAIN, afterwards, for fifteen years Judge in that Judicial District. Nominations in that County were not then obtained by contests in primary meetings. No such thing was known. Office sought the man, and not man the office. Place-seeking was discountenanced, though doubtless many were anxious to serve the public. But it was not every man that could find sufficient favor in a convention composed of twenty-five delegates from each district, as was then the custom in that County, selected for their trustworthiness in nominating fit candidates, and not brought together by contrivances, now too much in vogue, to accomplish special, political or personal ends. When, therefore, we find so young a man brought before the electors by such a body, it is fair to conclude that he possessed merit, and had exhibited qualities entitling him to the confidence and support of the people.

In 1841, he was appointed Deputy Attorney-General, by Hon. JOSIAH BAILEY, which office he held until it was abolished by the Convention of 1850. Of that body he was also a member, with Hon. DANIEL JENIFER, WILLIAM D. FERRICK and JOHN G. CHAPMAN, as his colleagues. In the Legislature and Convention he did not speak often or at much length, but not for want of facility in debate. He was among the diligent, assiduous members, taking his full share of the work in hand, and always enjoying the confidence and respect of his associates. With these exceptions he held no political appointment, but devoted himself to his profession, in which he attained a high reputation in civil and criminal cases; all the time, however, possessing the confidence of his party, and exerting extensive influence in the politics of his County. From 1851 we rarely met until 1861, when he was elected sole Judge in the Circuit, composed of Saint Mary's, Charles and Prince George's Counties, from which time he was on the Bench. During these years, I have practiced in one of these Courts, and had abundant opportunities of knowing him as a Judge. Of his qualifications and aptitude for a seat in this Court, it does not become me to speak in the presence of your Honors, who are so much more able to judge of those than I am. But I do not think his worth can be fully estimated or tested alone by these, but ought to depend, as well, on what was seen and known of him on the Circuit. In that sphere of duty, too much can scarcely be said of him, for he possessed in an eminent measure, the traits, that, in my opinion, are necessary to make a good *nisi prius* Judge. Dignified and firm, he was respectful to all, from the highest to the lowest, and attracted, without exacting, the respect of others; attentive to witnesses and to counsel, prompt and ready, without haste, in the application of the law to questions as they occurred, and evincing great familiarity with the principles of Evidence and Practice, trials proceeded in the most satisfactory manner, and when the final duty came to be

performed, of passing upon the law of the case as presented by counsel, his arrangement of the evidence as applicable to the prayers, and the ruling upon them, were so perspicuous and comprehensive, that the jury could not fail to understand the law of the case, and the questions of fact on which the verdict was to be found. And this, in most cases a delicate duty, was done without in any degree, trenching on the province of the jury as exclusive judges of the evidence, and without the slightest intimation of leaning one way or the other. I have had occasion often, to admire this faculty in Judge BRENT, as I have in other Judges, and mention it, not by way of comparison or contrast, but because acting officially in a rural portion of the State, these characteristics might scarcely be known and ascribed to him in a just degree, except in his own Circuit.

In private life he was without stain or reproach. He had many friends, and an extensive personal acquaintance in the State, and was held in the highest estimation by all who knew him. Indeed, no one could have intercourse with him without feelings of the highest respect and esteem for his personal qualities.

From those among whom it has been my fortune to mingle during his official service, I have never heard one word of criticism or censure or disapproval of his conduct, as a man or Judge; but, on the contrary, he has always been spoken of in terms of the highest admiration.

Of his home life I forbear to speak. Let us judge of that by what he was as seen and known abroad. With his bereft ones we can sympathize, and mingle our sorrow with theirs, without venturing into the sacred family circle. We leave them in the hands of Him who doeth all things well; who will provide for his orphans, and be a father to the fatherless.

I have given these imperfect utterances to the memory of one whom in life I honored as a friend, as in death he

deserves to be mourned by all. I now move, as a mark of respect to his memory, that the Court adjourn, and that such further order may be taken as may be appropriate to the melancholy occasion.

Mr. J. SHAAFF STOCKETT seconded the motion of Judge TUCK, and said:

I do not rise, if your Honors please, to add anything, if I could, to the very admirable portrait which has just been presented of the public and official life of the deceased Judge, by one who knew him long and well, but simply to offer a modest tribute to the memory of a departed friend.

My first recollection of Judge BRENT extends back many years—when I was a student of St. John's College, and he a member of the House of Delegates from Charles County—I can very well recall at this moment, his appearance at that time—even to the expression of his face. I never made his personal acquaintance, however, until after I was appointed State Reporter, and was introduced to him in this chamber, by your Honor, the Chief Judge. The acquaintance thus formed, gradually ripened into a cordial friendship; and I well remember, and with gratification, when during the past year, I was confined to my bed by a protracted sickness, how frequently with friendly interest and kindly sympathy, he visited my sick chamber—sometimes twice in the twenty-four hours.

Judge BRENT was a man of kindest impulses—his heart was as tender as that of a woman; yet he was manly and brave. He had a chivalric regard for the gentler sex. He possessed a nice sense of honor, and his conduct was fashioned according to the principles of right and justice. He was something more than an honorable man—he was a Christian gentleman. His piety was of that kind that seeks not self-exhibition, but is content to manifest itself in the daily walk and conversation. He had a scorn of anything mean, and gave no encourage-

ment or sanction to acts of doubtful propriety. He sought the right, and having satisfied himself as to what was the right, he pursued it with a steadfastness which gave no heed to what might be expedient or politic.

His bearing was that of a gentlemen always, and his deportment was characterized by a high-toned courtesy, and a delicate consideration for the feelings of others.

Although apparently reserved, he was a man of genial disposition, and enjoyed society in moderation. I do not think he had much taste for large assemblies, but, I think he found no little pleasure in intercourse with friends.

The native buoyancy of his disposition and the sprightliness of his temperament, doubtless felt, and responded to, the depressing influence of impaired health; but at times, in spite of this, he was bright and animated.

In the death of Judge BRENT, the State has sustained a loss; and without disparagement to his successor, whoever he may be, I can but wish he may fill the measure of the deceased, in the position which he adorned by his integrity and ability and dignified by his courtesy and urbanity.

Chief Judge BARTOL, responded as follows:

The mournful intelligence of the death of our beloved Brother Judge BRENT, which reached us a few days ago, was not unexpected.

When the Court met at the beginning of the October Term, a few lines were received from him, informing us that on his return from the Circuit Court in St. Mary's County, where he had presided, his health was seriously impaired, and he spoke doubtfully of his early recovery. A short time afterwards, our worst fears were confirmed by the announcement, coming from his physicians, that his malady was fatal, and all hope of again seeing him with us on this Bench was destroyed.

He knew his disease was fatal, but he was a brave man—not afraid to die. He bore his extreme suffering with Christian fortitude and resignation, and when death



came, it was for him a relief from pain, and a transition to a higher and better life.

Our brother was a sincere and devout Christian, his faith upheld him in his last hours, and with unfaltering trust he saw his end approaching, and welcomed death as a deliverer.

When such a man is removed from the scenes of his earthly labors, it is fitting that those who are left to mourn his departure, should give expression to their sorrow, and refer to his character and virtues, so that the memory of his noble traits, and of his career of honor and usefulness may be kept alive and not perish.

He was born in Charles County, Maryland, in 1817, and had therefore just passed his sixty-third year. In his youth he had the benefit of the best training by intelligent, refined and devout Christian parents, received his early education at Georgetown College, began the study of the law in the office of his uncle, Wm. L. Brent, Esq, in Washington City, and completed his legal studies at Harvard University. He commenced the practice of his profession in his native County, and soon evinced great legal learning and ability. After filling honorably various stations of public trust, as State's Attorney, as a member of the Legislature, a member of the Constitutional Convention of 1850; he was elected in 1861, Judge of the Circuit Court for the Counties of St. Mary's, Charles and Prince George's, and remained in that office till 1867, when he was elected Judge of the Court of Appeals, and presiding Judge of the Circuit Courts for Charles, St. Mary's, Prince George's and Calvert Counties, and held that office till the time of his death.

The manner in which he discharged its onerous, and responsible duties, is known to his associates, to the members of the Bar, and to the public, and won for him the reputation of an able, impartial and just Judge, always firm, but courteous and dignified in his demeanor on the Bench, and evincing extensive and accurate legal learning, and patient and laborious research.

We concur in all that has been so eloquently said in his praise to-day. His eminent public services, and spotless private character were known and appreciated by the people among whom he lived, and by all who knew him. By his death the State has lost an able and impartial Judge, and his associates on the Bench have to mourn the loss of a highly esteemed and beloved friend and brother. As an expression of our grief at his death, and a tribute to his memory,

*It is ordered*, that the Clerk cause the Court room to be draped in mourning during the present Term, and that these proceedings be entered on the minutes of the Court,—the Court will now adjourn.

# In Memoriam.

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## Court of Appeals.

THURSDAY, 17th of March, 1881.

During to-day's session the Hon. ALEXANDER RANDALL announced the death of the late Judge BOWIE in the following terms:

### MAY IT PLEASE YOUR HONORS:

In announcing, as requested, to this Court, the death of your esteemed Brother—RICHARD JOHNS BOWIE—I am performing a sad duty and under sadder emotions.

I am reminded by this duty, that being the oldest member of this Bar, I myself must ere long be called hence to be no more seen. I feel much too in speaking of the death and doings of one of my earliest and most esteemed friends, whom I knew intimately from his early manhood in this life, until his mature departure for the life to come,—I say *mature departure* for he *had* filled up more than his three-score years and ten, the span allotted for our existence here; and in that space he had lived a useful, patriotic and honorable life, and, we trust, prepared himself for the enjoyment of the endless life hereafter.

Recently, his former feeble health seemed recruited, and *that*, encouraged some promise of lengthened days,—but, at his age, such promises are delusive, for then emphatically, in the midst of life we are in death.

I need not speak of the many political, judicial, legislative, and other high offices, without the seeking, conferred upon him, nor how faithfully and promptly all their duties were discharged—for Maryland History has re-

corded them all, and you yourselves have read the record ; but in the discharge of the last of these offices—so silently and sadly attested by the vacant seat on your Honors' Bench, suitably draped in mourning,—allow me to refer to you personally as intimately knowing and highly appreciating his fidelity, talents and learning.

In all these offices he earned and retained the confidence, esteem and approbation of his fellow-citizens.

His intercourse with all men was maintained in a kind and affable bearing, and with a genuine politeness that made him friends every where—enemies he had none.

He was a consistent and useful member of the Episcopal Church, and acted worthy of that high calling.

In all the relations of life, his character was exemplary—the many who were blessed with his love, and enjoyed his home, or received his benefactions, mourn their irreparable loss in his death.

All who knew him admired him as a model of a Christian gentleman.

At his funeral, we read, crowds of friendly neighbors attended, and many of the good and of the great from abroad, were there ; they came to manifest by their presence at that solemn service, their high appreciation of his worth and of his virtues, and, at his grave, to pay their last honors to his memory—such were the life and death of your Brother, RICHARD JOHNS BOWIE—may they persuade many of the rising generation to imitate his noble and Christian example, and may we, his surviving friends, lay seriously to heart the instructive lessons they teach.

Upon the conclusion of the foregoing remarks, Mr. J. SHAAFF STOCKETT arose and said :

The drapery which solemnizes the atmosphere of this chamber, only too sadly reminds us of how short a time has elapsed since we were called upon to mourn the loss of a Member of this Court. And now we are again assembled to take notice of the departure of another. Judge

RICHARD JOHNS BOWIE has deceased. The courteous gentleman, the upright Judge, the humble Christian, has been taken from us crowned with years and with honor; he has come to the "grave in a full age, like as a shock of corn cometh in his season."

The community in which he held so prominent a position and filled so large a space will greatly miss him—he was highly and justly esteemed. While the kindness of his heart and the affability of his demeanor endeared him to many, his high-toned and elevated character commended him to the respect of all.

It has been well said by a prominent Journal, in announcing the death of the deceased, that, "Few men in this State have more justly, and in a greater degree, enjoyed the honor and esteem of their fellow-citizens, without distinction of party, than Judge BOWIE, in his long public career. He was everywhere and by all with whom he came in contact, recognized as a man of unblemished integrity, a nice sense of honor, never seeking political office, but belonging to that class, of whom few are now to be met with, who believed in the principle, that, the office should seek the man—and it frequently sought him. The trust reposed in him by his fellow-citizens was never betrayed."

I have no purpose to review the official life of the deceased; my object is simply to give expression to my estimate of his character as a man, and to offer a modest tribute to his memory.

I may be allowed here to refer to an incident somewhat singular, if not without parallel, in judicial experience. In 1861, when the deceased was elevated to the Bench and was commissioned by the Governor as Chief Justice of Maryland, he found as one of his associates the present Chief Judge, who I earnestly hope may for years to come continue to occupy the position he now adorns—May he late depart to the regions of the blessed. Under the Constitution of 1867, which re-organized the Judiciary

of the State, Judge BOWIE, who was a candidate, was not re-elected. Judge BARTOL was returned and was appointed Chief Judge. In 1871, Judge BOWIE was elected from the sixth judicial circuit as an Associate Judge of this tribunal, and was welcomed by Chief Judge BARTOL, who is now, in his official position, called upon to give voice to the feelings of the Court on this mournful occasion.

It is in the death of such men as Judge BOWIE, that the sorrow at their taking away, is greatly alleviated; and the living are comforted by the reflection that their loss has been the gain of the departed. May the loving partner of so many years, who survives him, find in this reflection a consolation for the grief which now afflicts her widowed heart.

Chief Judge BARTOL made the following response:

The emblems of mourning recently placed in this room, express our sorrow caused by the death of our late lamented Brother Judge BRENT; and now in the short space of two months, we are called on to mourn the loss of another beloved associate.

The intelligence of Judge BOWIE's death came upon us most unexpectedly. Although advanced in years, and never of robust constitution, he appeared to us to have the promise of many more years of usefulness and honor. On the second day of this month he parted from us apparently in good health, and we little thought that we then looked upon his kindly and familiar face for the last time. By the inscrutable dispensation of Providence, he has been taken from the scenes of his earthly labors, and transferred, we firmly believe, to a better world.

He was a man who illustrated during his whole life, the highest type of a gentleman and a Christian, beloved by all who knew him.

His fellow-citizens evinced their high appreciation of his character, by calling him to many positions of honor,

all of which he filled with great credit and ability. We concur in all that has been so well said in his praise by the gentlemen who have spoken of him to-day.

As a lawyer he was learned, able, eloquent, and faithful. After filling the place of State Senator for four years, he was elected to the Congress of the United States, where he was distinguished for his urbanity, and statesmanlike deportment. In 1861, he was elected a Judge of this Court, and appointed by the Governor Chief Judge, a position which he filled for six years; when by a change in the Constitution and a re-organization of the Judiciary, he was displaced, and after an interval of four years he was again elected to a place on this Bench.

When near the age at which, by the Constitution, he would be disqualified, the Legislature, by a unanimous vote extended his time. This brief narrative of his career demonstrates the high estimation in which he was held by his fellow-citizens.

His services as a Judge during a period of more than fifteen years, evinced great industry and judicial ability, and his deportment towards his associates and the members of the Bar, was at all times distinguished by the greatest courtesy.

By his death the State has lost an able and upright Judge, and we have to lament the loss of a highly esteemed and beloved Brother.

As a mark of respect for his memory, it is ordered that the emblems of mourning in the Court Room be continued during the ensuing April Term, and that these proceedings be entered upon the Minutes of the Court, and that the Court now adjourn.





# MARYLAND REPORTS.

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APRIL TERM, A. D., 1879.

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CHARLES B. BOYLE *vs.* JONATHAN SCHINDEL.

*Action at Law—Decree in Equity for the Payment of Money.*

In this State an action at law will not lie to recover a sum of money decreed to be paid by a Court of Equity, within the same jurisdiction.

APPEAL from the Circuit Court for Washington County.

This was an action of debt brought by the appellee against the appellant. The *narr.* contained two counts. The first count recited an order of the Circuit Court in equity, in the case of *Keedy and others vs. Schindel and others*, ratifying a sale to the defendant, and further directing the defendant, as purchaser, to pay to Samuel E. Schindel, during his life-time, the annual interest on the mortgages to Judge ALVEY and George Schindel, described in the proceedings, to wit, \$208.82 annually; that this sum was due January 25, 1877, and was still unpaid; that Samuel E. Schindel, by a proper writing, assigned to the plaintiff all the right, etc., in and to said interest, and the defendant was notified of said assignment, but did not pay the said annual interest.

The second count recited that Samuel E. Schindel's father, by his will, directed his executors to pay to Samuel E. Schindel annually, the interest on a designated sum, which sum his father's executors secured by mortgages on Samuel's lands, which lands were sold to the defendant,

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Boyle vs. Schindel.

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who was ordered by said Court to pay to Samuel E. Schindel, the annual interest on said mortgages, by the terms of the order ratifying the sale; that said Samuel assigned this legacy to the plaintiff, that the defendant was duly notified of said assignment, but did not pay the said interest.

To this *narr.* the defendant demurred, and the Court (MOTTER and PEARRE, J.,) overruled the demurrer. The defendant objected, that an action at law would not lie upon such order of a Court of equity.

The defendant then filed seven pleas. Issue was joined on all save the third and fourth pleas, to which the plaintiff demurred, and his demurrer was ruled good.

In the progress of the trial the defendant took three exceptions, which need not be set out. The verdict and judgment being for the plaintiff, the defendant appealed.

The cause was submitted on briefs to BARTOL, C. J., BOWIE, BRENT, MILLER and ROBINSON, J.

*H. H. Keedy* and *Alexander Armstrong*, for the appellant.

*Louis E. McComas*, for the appellee.

The demurrer was properly overruled. The decretal order sued on was of the dignity of a decree. Any order or decree finally settling any disputed right or interest of the parties, is a final decree. An order ratifying a sale amounts to a decree for the payment of money. *Richardson vs. Jones*, 3 G. & J., 186; *Ware vs. Richardson*, 3 Md., 555; *Wyman vs. Jones*, 4 Md. Ch. Dec., 500; *Freeman on Judgments*, secs. 34, 36.

In Maryland, decrees and judgments are often referred to as of equal dignity. A Court of equity like a Court of law, is a Court of record. *Miles vs. Gardner*, 5 Gill, 100; *C. and O. Canal vs. Gittings*, 36 Md., 276; *State, use of Bru-*

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Boyle vs. Schindel.

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*ner, et al. vs. Ramsburg, et al.*, 43 *Md.*, 333, 335; *Bruner & Walker vs. Ramsburg*, 43 *Md.*, 567; *Dorsey's Lessee vs. Garey*, 30 *Md.*, 494, and cases cited; *Farmers' Bank vs. Thomas, et al.*, 37 *Md.*, 255.

An action of debt can be maintained on a judgment of a Court of law. In this country, in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, *the like action can be maintained upon a decree in equity, which is for an ascertained and specific amount*, and nothing more, and the record of the proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record of the other. *Freeman on Judgments*, sec. 434, and cases cited, note 4; *See Nations, et al. vs. Johnson, et al.*, 24 *Howard*, 203.

Nor is the action of debt used only on foreign decrees. In New York, in one case, this was the principal point discussed, and Ch. J. SAVAGE says, "the general rule is that this form of action is proper for any debt of record, or by specialty, or any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a Court of Chancery of another State, *and no doubt the action will lie upon such a decree in our domestic Courts of equity.*" He concludes that upon a final decree of the Surrogate, even debt will lie. *Dubois vs. Dubois*, 6 *Cowan*, 496; *Pennington vs. Gibson*, 16 *Howard*, 78.

BOWIE, J., delivered the opinion of the Court.

The primary and principal question presented on this appeal, decisive of all others in the case, is whether an action at law can be maintained in this State to recover a sum of money decreed to be paid by a Court of equity *within the same jurisdiction.*

The general principle, that actions at law will lie on decrees of other States for the payment of money only

out of and beyond their jurisdiction, is well established by authority both in England and the United States, but, broad propositions, originating in cases of this character, have been adopted and used by Judges and text writers, so as to produce some confusion.

It was a cardinal rule of the Courts of law in England, that no action at law should be brought to enforce a decree in Chancery within its jurisdiction, but such actions were allowed and maintained on decrees of colonial Courts.

The reason is obvious, that in the one case there was full power existing in the Court which rendered the decree, to enforce it, and in the other the decree would be ineffectual, unless the Courts of law recognized them as evidences of debt and made them effective by judgment and execution.

The leading cases cited and relied on by both appellant and appellee are *Hugh vs. Higgs and Wife*, 8 *Wheaton*, 697; *Pennington vs. Gibson*, 16 *Howard*, 65, and *Richardson vs. Jones*, 3 *G. & J.*, 186.

The case of *Hugh vs. Higgs* was decided by that eminent jurist, Chief Justice MARSHALL, all of whose opinions, however brief, are entitled to the most profound respect. His opinion relating to this subject is substantially as follows :

"This is an action on the case brought to recover the money which the plaintiff in error had been decreed by a Court of Chancery to pay to the defendant in error. The defendant in the Court below contended that an action at common law did not lie on a decree in chancery, and excepted to the opinion of that Court overruling this objection. It is admitted by the opposite counsel that in general the action does not lie to recover money claimed under the decree of a Court of equity, but he supposed that in this case the money had been received by the defendant below upon transactions which took place after the decree. Upon examining the record, we perceive the

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Boyle vs. Schindel.

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money was in his hands as trustee at the time the order to pay it over was made."

The case of *Pennington vs. Gibson* was an action of debt brought in the Circuit Court of the U. S. for the district of Maryland by the defendant in error, against the plaintiff in error, on a decree obtained by the former against the latter and others in the Supreme Court, in equity, of the State of New York, and carried by writ of error to the Supreme Court of the United States.

The chief question before the Court was, whether the decree of a Court of equity of *another State* was of such dignity and finality that an action of debt could be maintained on it, without averring in the *narr.* that the decree was in the State in which it was rendered, of equal efficiency, as a judgment at law.

The Supreme Court held the affirmative, and the judgment of the Court below was sustained. The objection, that the remedy was in equity and not at law, on a decree of a Court of equity within its own jurisdiction, was incidentally considered. Although not necessary to the decision, the Court announced the following postulate:

"We lay it down, therefore, as the general rule, that in every instance in which an action of debt can be maintained upon a judgment at law for a sum of money awarded by such judgment, the like action can be maintained upon a decree in equity, which is for an ascertained and specific amount and nothing more; and that the record of proceedings in the one case must be ranked with and responded to as of the same dignity and binding obligation with the record in the other."

Notwithstanding the strictures of the learned Judge in commenting on *Hugh vs. Higgs and Wife*, he declares, "There is yet another ground on which this case, so imperfectly stated, might form an exception to the rule, which authorizes actions of debt upon decrees in equity. In the case last mentioned the action at law was brought,

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Boyle vs. Schindel.

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and the judgment rendered within the regular limits of the equity jurisdiction of the Court, and to the full extent of which limits the Court of equity had the power to enforce its decrees. \* \* \* \* Under these circumstances it might well be ruled, that a party having the right to avail himself directly of the power and process of the Court, should not capriciously relinquish that right, and harass his adversary by a new and useless litigation."

The exception is the rule for which the appellant contends, and by which this case must be governed.

The case of *Richardson vs. Jones*, was that of a purchaser at a sale under a decree in chancery, seeking by petition to have the sale vacated after a great lapse of time, upon the ground that he purchased as agent of the trustees who made the sale, and the whole benefit had accrued to them. Benjamin Richardson, the purchaser, had given bond for the purchase money, with William Richardson and others as his sureties; the Chancellor dismissed his petition and ordered that B. and W. Richardson forthwith pay into Court the whole amount of the purchase money due, from which order B. and W. Richardson appealed.

In the course of the argument, the question collaterally arose as to the proper remedy for enforcing the payment of money under such circumstances. In commenting on which the late Chief J. BUCHANAN, said, "Where a sale is made under a decree or order in chancery, and no bond or security is given for the payment of the purchase money, a practice has grown up in chancery and sanctioned by this Court in *Anderson vs. Foulke*, 2 *Harr. & Gill*, 346, to compel the purchaser to complete his purchase by an order on him in a summary way to pay or bring the money into Court, and that from necessity arising out of the peculiar character of such transactions. No action at law will lie to enforce a decree in chancery, within the territorial jurisdiction of the Court of Chancery. An order of the Court of Chancery ratifying such a sale, is considered as amount-

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Boyle vs. Schindel.

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ing to a decree for the payment of the money; and if that Court could not enforce the execution of it, it could not be enforced at all." 3 G. & J., 186.

It has been correctly said, that the proposition "that no action at law will lie, etc., in this case was *obiter dictum*; yet it has always been regarded as an announcement from the highest judicial source in the State, of what was the practice and law in that respect. From the foregoing partial analysis of the leading cases on this subject, in this State and the Supreme Court of the United States, it appears that the doctrine contended for by the appellant, has the sanction of Chief Justices MARSHALL and BUCHANAN, approved by the Supreme Court of the United States.

Whatever may be the law in other States as laid down by the text writers, we feel bound to adhere to the ancient ways marked out by our predecessors.

It is not because decrees of Courts of equity are not of equal dignity and finality with judgments at law, that they are not subjects of suits at law in this State, but because they are *so equal and final* they require no extrinsic aid from Courts of law to give them full force and effect.

Courts of equity within their own jurisdiction have full power to issue judicial writs to enforce their decrees with equal economy and despatch as at law.

Having acquired jurisdiction over the parties and the subject-matter by previous proceedings, it is proper, that what was commenced in a Court of equity should be concluded in the same, for many reasons too obvious and numerous to be assigned.

The Court having erred, in our opinion, in overruling the demurrer, the judgment below will be reversed with costs.

*Judgment reversed with costs.*

(Decided 19th June, 1879.)



ANSLEY GILL and JAMES McMAHON vs. WILLIAM  
F. WELLER.

*Conditional acceptance of an Order.*

The eighth count of the *narr.* in this suit brought by the appellee against the appellants declared upon the following order and acceptance :

“GRANITE, Aug. 28th, 1877.

“MESSRS. GILL & McMAHON.

*Gent.*—Please pay Wm. F. Weller, or order, two hundred dollars on Sep't 10, and your note for bal. due on forty thousand Belgian paving blocks, at forty-eight dollars pr. thousand, James Clegg agreeing to deliver you, forty or more thousand blocks, on the line of your road on cars, or the place called the Summit.”

“JAMES CLEGG.”

“We accept this order when the blocks *is* delivered.”

“GILL & McMAHON.”

It was in evidence that thirty-eight thousand three hundred blocks were delivered by Clegg, and received by the defendants before the 10th of September. On the 11th the plaintiff took possession under a bill of sale, of the granite blocks quarried by Clegg; and on the next day called on the defendants, to ascertain the number of blocks that had been delivered, and proposed to deliver the balance, when he was informed by them that they did not then want them, that they had no use for them. The plaintiff directed his men to deliver at the “Summit” the remaining seventeen hundred blocks, which was done four or five days thereafter. The defendants refused to receive them; but the blocks were nevertheless “dumped” out upon the ground, there being no cars there at the time in which to put them. **HELD:**

- 1st. That the acceptance of the order was conditional, and binding on the defendants only in the event that the whole number of forty thousand blocks should be delivered by the 10th day of September.
- 2nd. That as there was no privity of contract between the defendants and the plaintiff, and as the whole right and claim of the latter was based upon the order and acceptance, no right of action could

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Gill & McMahon *vs.* Weller.

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arise, the condition not having been performed by the delivery of the blocks before the 10th day of September.

APPEAL from the Superior Court of Baltimore City.

The eighth count of the declaration in this case was as follows:

8. And for that James Clegg drew his order on the defendants to pay to the plaintiff \$200.00 on the 10th September, A. D. 1877, and to give his note for the balance due on 40,000 Belgian blocks, at \$48 pr. m., and the defendants accepted said order with the condition "when the blocks is delivered," and the said blocks have all been delivered, but the defendants refuse to comply with the order, to the great damage and injury of the plaintiff. The defendants pleaded, for a first plea, that they never were indebted as alleged, and for a second plea, that they did not promise as alleged, and for an additional plea, that heretofore, to wit, on the 21st day of September, 1877, James W. Offutt obtained a judgment in the Circuit Court for Baltimore County, against James Clegg, in and for the sum of \$360.67, (three hundred and sixty dollars, sixty-seven cents, with interest from date and costs of suit,) and that subsequently, to wit, upon the 21st day of September, 1877, at the instance of the said James Clegg, there issued out of this Court an attachment upon said judgment, in accordance with the Act of Assembly, in and for such cases made and provided, to recover the said sum aforesaid of \$360 and  $\frac{67}{100}$  as aforesaid, and costs of the said suit, which attachment was laid in the hands of the defendants on the 22nd day of September, 1877; and that subsequently on September 18th, 1877, a certain Andrew Logan obtained also in the said Circuit Court of Baltimore County, a certain other judgment against the said James Clegg, in and for the sum of twelve hundred and fifty-one dollars and eighty-eight cents, with interest and costs, upon the 18th day of September, 1877; that the said Andrew

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Gill & McMahon vs. Weller.

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Logan, on the 26th day of *November*, (?) 1877, in accordance with the Act of Assembly in and for such cases made and provided, caused an attachment to issue from this honorable Court upon the said judgments last aforesaid, for the recovery of the said sums last aforesaid, and costs of said attachment; which attachment was laid in the hands of these defendants on the 27th day of September, 1877; and the defendants in fact say, that the said attachments upon the said judgments so as aforesaid, were and are issued to recover condemnation of the sum of money supposed and declared by the plaintiff to be due unto himself, upon the eighth count in his said declaration contained, from these defendants; and these defendants say, that in fact they are not otherwise in anywise indebted to the said plaintiff, than in respect of the said sum sought to be recovered under the said eighth count aforesaid, without this, that they are in anywise, and for any sum of money whatsoever, indebted unto the plaintiff upon the said declaration aforesaid, and that the said attachments are in fact levied to recover condemnation by the said James Offutt and Andrew Logan, creditors of the said James Clegg, of the same sum of money, for the recovery of which as aforesaid the said plaintiff hath declared in his said count number eight.

The plaintiff demurred to the additional plea, and the Court sustained the demurrer.

*Exception.*—The Court (DOBBIN, J.) instructed the jury as follows:

If the jury shall find the execution by Clegg of the order given in evidence, and the acceptance thereof by the defendants written thereunder, and shall further find that the whole number of blocks were delivered and accepted by the defendants, and that the defendants afterwards refused to pay for them, the plaintiff is entitled to recover.

And the defendants offered the following prayers:

1. That upon the contract offered in evidence, there is

no evidence legally sufficient to have entitled the plaintiff to recover the sum of \$200, on the 10th day of September.

2. If the jury find from the evidence that the full amount of forty thousand blocks were not delivered on or before the 10th day of September, then the plaintiff is not entitled to recover under the eighth count therefor, unless the jury shall find that subsequently the balance of the said stone was delivered with the consent and acquiescence of the defendants, of which consent and acquiescence there is no evidence.

3. That the acceptance of the order offered in evidence is conditional upon the delivery of the whole of said blocks; and if the jury shall find that the entire number of forty thousand was not delivered on or before the 10th day of September, 1877, then their verdict must be in favor of the defendants.

4. That the contract for the payment of the balance by a note is void for uncertainty, and the plaintiff is not, in this action, entitled to recover for any other sum, in respect of which the said note was supposed to have been delivered.

5. If the jury shall find from the evidence that the whole sum of forty thousand blocks were not delivered, then the condition of the accepted order has not taken effect, and the defendants are not liable under the said acceptance, and their verdict must be in favor of the defendants.

6. That there is no evidence upon which the plaintiff is entitled to recover under the first, second, third, fourth, fifth, sixth and seventh counts.

7. That there is no evidence legally sufficient to go to the jury, under which the plaintiff is entitled to recover under the eighth count.

8. That under the order of James Clegg, dated August 28th, 1877, and directed to Gill and McMahon, the plaintiff is not entitled to recover on said order mentioned,

unless the jury find from the evidence that a note was given by Gill and McMahon to the plaintiff, as requested in said order, and that there is no evidence that any note was so given.

9. That if the jury find, as testified by the plaintiff, that the only conversation in respect of the order, took place in Fayette street, and was of the substance following: "I, the plaintiff, asked McMahon what he would do with the order; he said he wouldn't pay it, that there was a contention about it, and he would not be bothered with it;" then there was no demand sufficient in law for the fulfilment of the said contract, and the plaintiff is not entitled to recover.

The Court granted the fifth and sixth prayers of the defendants, but refused their other prayers. To the instruction of the Court and to its refusal to grant their first, second, third, fourth, seventh, eighth and ninth prayers, the defendants excepted, and the verdict and judgment being for the plaintiff, they appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON and ROBINSON, J.

*John Henry Keene, Jr.* and *A. Stirling, Jr.*, for the appellants.

*Fielder C. Slingsluff*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellee; the declaration contains eight counts; at the instance of the appellants, the defendants below, the Superior Court instructed the jury that there was no evidence upon which the plaintiff was entitled to recover under the first seven counts. The case was tried and the verdict and judgment rendered

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Gill & McMahon vs. Weller.

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upon the *eighth count*, which declares upon the order and acceptance following:

“GRANITE, Aug. 28th, 1877.

MESSRS. GILL & McMAHON.

*Gent*.:—Please pay Wm. F. Weller or order, two hundred dollars, on Sept. 10th and your note for bal. due on forty thousand Belgian paving blocks, at forty-eight dollars pr. thousand, James Clegg agreeing to deliver you forty or more thousand blocks, on the line of your road *on cars*, or the place called the *Summit*.

JAMES CLEGG.”

“We accept this order when the blocks *is* delivered.

GILL & McMAHON.”

It appeared in evidence that the appellants were contractors for paving West Falls Avenue, in Baltimore, for which they required Belgian blocks, and contracted with Clegg to deliver them. The appellee held a bill of sale of Clegg's property, and consented to the contract made by the latter with the appellants, provided the payment of the price for the blocks should be secured to him, hence the order was drawn.

It further appeared in evidence that 38,300 blocks were delivered by Clegg and received by the appellants before the 10th of September.

On the 11th, Weller took possession under his bill of sale of the granite blocks quarried by Clegg, and next day called on the appellants to ascertain the number of blocks that had been delivered and proposed to deliver the balance, when he was informed by the appellants “that they did not now want them, that they had no use for them.” It may be inferred from the evidence that their contract for paving had been broken up; McMahon testified that Weller had taken it away from them, which however was denied by Weller in his testimony.

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Gill & McMahon vs. Weller.

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The appellee directed his men to deliver at the "*Summit*" the remaining 1700 blocks, which was done four or five days thereafter; the appellants refused to receive them, their workmen told Weller's men not to unload the wagons, and tried to prevent them from doing so; the 1700 blocks were "dumped" out upon the ground, there being no cars there at the time in which to put them.

Evidence was offered that the appellee demanded payment and was refused.

The exception of the appellants was taken to the ruling of the Superior Court upon the prayers.

There can be no doubt of the correctness of the Court's instruction to the jury considered by itself.

It is free from objection, provided there was evidence in the case to support it, and that cannot be denied or questioned on this appeal, as no special exception was taken to it in the Court below on that ground. We cannot therefore reverse on this instruction.

The defence rests upon the proposition that the acceptance of the order was conditional, and binding on the appellants only in the event that the whole number of 40,000 Belgian blocks should be delivered by the *10th day of September*, and in our opinion this is the true meaning and construction to be given to the acceptance. This appears from the fact that the 10th day of September, was the time fixed for the payment of \$200 in cash and for giving the promissory note for the balance. The character of the work in which the appellants were engaged, the purposes for which they wanted the blocks, and the other evidence in the cause supports this construction.

There being no privity of contract between the appellants and appellee, and the whole right and claim of the latter being based upon the order and acceptance, it follows that if the condition was not performed by the delivery of the blocks before the 10th day of September, no right of action could arise. The appellants might have waived a

compliance with the condition, and have received the blocks after the day named; but in this record there is no evidence of such waiver, nor of the acceptance by them of the 1700 blocks, attempted to be delivered by the appellee after the 10th of September, consequently the *second* and *third* prayers of the appellants ought to have been granted.

It was not error to refuse their *fourth* prayer, as it was shown by the testimony of Weller, admitted without exception, that the note mentioned in the acceptance was to be a note at sixty days.

Their *eighth* and *ninth* prayers were also properly refused; the *eighth* because the failure to give the note could not of itself defeat the action; and in our opinion there was sufficient evidence, to be submitted to the jury, of a demand by the appellee, and a refusal by the appellants to pay the money or give the note.

Their *first* and *seventh* prayers were also properly refused because too general, in omitting to state any point upon which the evidence was insufficient. Here there was not a total failure of evidence. *Hatton vs. McClish*, 6 Md., 407; *Warner vs. Hardy*, 6 Md., 540, 541.

With respect to the demurrer to the *third* or additional plea, the Superior Court was clearly right in its ruling.

Being of opinion there was error in refusing the defendants' *second* and *third* prayers, the judgment will be reversed and a new trial ordered.

*Judgment reversed and  
new trial ordered.*

(Decided 19th June, 1879.)



THE KNICKERBOCKER LIFE INSURANCE COMPANY OF  
THE CITY OF NEW YORK *vs.* PAULINE DIETZ.

*Life Insurance—Failure to pay Interest on Premium Notes—  
Forfeiture—Equity will not relieve.*

In contracts of Life insurance, the time for the payment of interest on the premium notes, is of the very essence of the contract, and must be strictly complied with; and if by the terms of the policy, it is to become void upon a failure to pay such interest at the time specified, equity will not relieve against the forfeiture.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued for the appellant before BARTOL, C. J., BRENT, GRASON, MILLER and ROBINSON, J., and submitted for the appellee.

*Charles Marshall*, for the appellant.

The Court below, adopting the view of the Court of Appeals of Kentucky, in the case of *St. Louis Mutual Life Ins. Co. vs. Grigsby*, 10 *Ky. State Reports*, 310, held that it was competent for a Court of equity to relieve the complainant from the consequences of her default, inasmuch as the company could be compensated out of the policy, and would sustain no loss. It regarded the second condition of the policy as imposing a penalty against which it could relieve on giving compensation.

The question is a vital one to the insurance business; and it is submitted the decision cannot be sustained on principle, and is against the great weight of authority.

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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The decree is founded upon an erroneous view of the contract of insurance. It is not a continuing contract. The company has no power to compel the payment of interest or of the premium. It continues as long as the insured chooses that it shall, and no longer. By paying or tendering at the proper time the money necessary under the contract to keep the policy in existence, whether that money be premium or interest on premium, the insured may hold himself and the company bound by all the terms of the agreement; and by refusing to pay, he may discharge himself from all obligation. Under these circumstances, it is manifestly repugnant to the idea of mutuality in the contract, to hold that the company shall be bound, at *any time*, at the will of the insured, he being at the same time under no obligation himself. *Bradley vs. Potomac Fire Ins. Co.*, 32 Md., 115; *Busby vs. The North Am. Life Ins. Co.*, 40 Md., 586.

The doctrine of *penalties*, with all respect, has nothing to do with the case. The forfeiture of the policy on non-payment of interest or premium, is in no sense a penalty for *non-performance of a duty that the company had the right to require to be performed, or which the assured had agreed to perform*. It is a mere declaration, that if the assured elect at the end of any year not to renew the contract, it shall not be renewed; but he being discharged, the company shall be also.

These contracts are based upon nice and accurate calculations, the elements of which are derived from laborious and extensive study of vital statistics. The general theory upon which the amount of the premium is fixed, is, that assuming that a man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as invested annually at a certain rate of interest, and compounded, will at the end of that time amount to enough to pay the policy and cover the expenses of the company.

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Knickerbocker Life Ins. Co. of New York vs. Dietz.

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To reach this result, all the elements of the calculation must concur. The premium must be paid, it must be invested, and the interest from it must be re-invested at the assumed rate, otherwise the ability of the company to pay the policy, instead of being a matter of reasonably accurate calculation, becomes a mere matter of hap-hazard. The business ceases to have any scientific or accurate basis, and every policy is the veriest wager on the life of its holder.

It is evident that these remarks apply equally to the case in which the company collects the whole premium, and invests and re-invests it and its proceeds, as to those in which it invests part by lending it to the assured himself on the security of his policy. In either case it is indispensable that the interest be promptly paid, in order to be re-invested, according to the principle on which the amount of premium is fixed. It would be easy to illustrate the working of the decision in this case, by supposing a large amount of the company's money invested in loans of this character, and supposing the company to be deprived of the opportunity of re-investing the interest promptly by the default of the policy-holders. It is manifest that the whole calculation on which the rate of premiums had been fixed, would be frustrated, the rates would be too low, the premiums would fail to provide the means to pay the policy when it becomes payable in the ordinary course of things, and ultimate ruin of the company would be absolutely and mathematically certain.

It follows from these considerations, that strict compliance with the terms of the contract, as to payment of premiums and interest, is *necessarily*, from the very nature of the business of life insurance, *of the essence of the contract*; and that no dispensing power can be exercised over such contracts by the Courts, without absolutely defeating the end and object of one of the contracting parties, and ultimately of both.

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Knickerbocker Life Ins. Co. of New York vs. Dietz.

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These principles are recognized and asserted in the following well-considered cases:—*N. Y. Life Ins. Co. vs. Statham, et al.*, 93 *U. S.*, 24; *Pitt vs. Berkshire Life Ins. Co.*, 100 *Mass.*, 500; *Robert vs. N. E. Mut. Life Ins. Co.*, 1 *Disney*, 355; *S. C.*, 2 *Disney*, 106; *Baker vs. Union Mutual Life Ins. Co.*, 43 *N. Y.*, 283; *Roehner vs. Knickerbocker Life Ins. Co.*, 63 *N. Y.*, 160; *Anderson vs. St. Louis Mutual Life Ins. Co.*, 5 *Bigelow Life & Ac. Ins. Rep.*, 527; *Russum vs. St. Louis Mut. Life Ins. Co.*, 5 *Bigelow*, 243; *Nettleton vs. St. Louis Mut. Life Ins. Co.*, 6 *Ins. L. J.*, 426; *Patch vs. Phoenix Mut. Life Ins. Co.*, 44 *Verm.*, 481; *Davis vs. Thomas*, 1 *Russ. & Mylne*, 506; *Ensworth vs. Griffiths*, 5 *Brown's Par. Cases*, 184.

*Thos. R. Clendinen*, for the appellee.

The appellee, in consideration of the payment of the premiums for five years, as to which there is no dispute, was absolutely entitled at any time thereafter to a paid-up policy.

In the issuance of such new policy the appellant was not entitled to insert any terms or conditions not embraced in, or not provided for by the original policy, unless agreed to by the appellee. If any terms not agreed to by the appellee have been inserted in the new policy by the appellant, they cannot affect the former.

There is no evidence that the appellee ever agreed to the condition now insisted upon by the appellant, but on the contrary she never heard of it until she found the policy in the house.

It would have been the province of a Court of equity to have enforced the issuance of a proper policy under the provisions of the original one.

This present policy with the condition of forfeiture is not a proper policy, nor such a one as is warranted by the terms of the original contract, or anything done or agreed to by the appellee.

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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It is in the power of a Court of equity to do now what it could have done before, had it then been called upon to direct a proper policy to be issued.

As the loss has now occurred, it is in the power of a Court of equity, while construing the contract and reforming it to whatever extent is necessary, to go further, and decree payment of the money. A resort to a Court of equity, being necessary under the circumstances of this case, the Court had the undoubted right to decree payment.

As this is a contract of *loan as set up by the appellant* to the amount of \$183.91, and as the paid policy was pledged for its return, according to the expression in the policy, \$183.91 are now charged against the policy, it should be governed and regulated by the usual and ordinary rules which affect and govern loans and the pledging of security therefor, and there should not be in this case, as we believe there is not in law or justice anywhere, one rule for individuals and another for insurance companies.

Judged by such well known and universally recognized rules, full justice is done the appellant when the entire *loan* it claims, and the *interest*, is deducted from the principal it covenanted to pay.

Being a default only in *time*, it admits of certain and adequate compensation by the allowance of the deduction of *the loan and interest* from the principal debt.

None of the rules or reasons which apply to the payment of *premiums on the day when they are stipulated to be paid*, apply to or have any force in reference to the payment of interest under the circumstances of the present case, because a premium is a sum paid in insurances *invariably in advance*, and is the consideration because of which the insurer undertakes to carry the risk for any stipulated period in the future; the insurer is thereby *paid* for a risk to cover some period in the future yet to come and unexpired.

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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While in this case such *premiums* had been paid in *advance* for five years, and the payment of them had ceased, no *premium* was paid or demanded in 1873, none in 1874. *Interest* was then claimed. Interest for what? Why the detention of the sum of \$183.91, a *loan* which the insured (the dead man) owed the appellant. It is not even a debt which the appellee owed, and there is no pretence that she ever was such debtor or was ever a party to the arrangement by which it became due.

There is some reason in the payment of *premium in advance*; and the just reason why an insurer is not liable on account of its non-payment is, that he has not been paid for the risk; but in this case he had been paid; he had gotten five years' *premium*; the contract was executed; the insurance was absolute for the term of his natural life. There was a *loan*, however, from the insurer to the insured of \$183.91, on which *loan* the insurer, like many other people who loan money, desired interest annually *at the end of the year, not in advance*, (as was the case with premiums,) for the reason that, being an ordinary debt, *interest was to be paid at the end of the year*, for its detention; just as it would have been in an ordinary transaction, if both parties had been private individuals, and one had not happened to be an insurance company. Suppose the appellee or her husband had borrowed \$183.91 from any one else than the appellant, and this same policy had been pledged for its ultimate payment, with the same clause as to forfeiture upon non-payment of *interest on the day* it was due, as is found in the new policy—we venture to say it would never be asserted in a Court of equity that forfeiture would follow under such circumstances as the present case presents. Then, why should it follow here?

The simple fact that the appellant is the creditor, certainly gives it no right which would not be possessed by any other creditor. And if not, why should the appel-

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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lant ask for a different measure of justice from that which would be meted out to others.

The appellee is not bound or affected by anything done between the appellant and the appellee's husband, as neither had the right upon either policy to affect her interest, and as the stipulations as to forfeiture in the new policy and the note for loan were inserted without her knowledge or consent, they do not affect her in any way.

The loan by the appellant to the appellee's husband was not a proper set-off to her claim against it, as she was not a party to the same; and while she, in her bill of complaint, expressed a willingness to have it deducted, it was not on the ground of its being due by her, but because she desired to have deducted whatever was rightly due by her husband, in consequence of which, in the decree of the Court below, the full amount of the loan, (\$183.91,) with interest to August 1st, 1878, was deducted from the amount of the policy and interest due the appellee.

Even if the appellee was aware of the exchange of policies, the loan by her husband and the stipulations in the policy and note as to forfeiture, and consented to them all, she is still entitled to recover, as this is an unconscionable contract, and in the nature of a penalty and forfeiture against which it is in the power and province of a Court of equity to relieve.

There is in the old policy no provision made for the forfeiture of the new policy on any account whatever; it says "without subjecting the assured to any subsequent charge, except the interest annually on all premium notes remaining unpaid on this policy;" it does not anywhere say that it would require the *payment* of interest annually; and how can it justly claim to forfeit a policy on account of non-payment? It seems to us manifest that the stipulations in the new policy requiring payment in cash of interest, and forfeiting the policy in default thereof, were never contemplated between the parties, were never agreed

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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to or understood, and are improperly there. It is clear that the loan itself was not to be paid in cash, and it is equally clear that there was no provision in the stipulation in the original policy under which this new one was obtained, that the interest was to be paid. The expression is *charge*, which, according to Webster, is a burden and imposition, and that which constitutes a debt, the loan not being paid.

Interest was to be charged as it ordinarily is when a loan is not paid, and that was to be charged against the new policy.

The real contract is expressed in the new policy where it says:

"And the said company do hereby promise and agree to pay the amount of said insurance in three months after satisfactory proof of the death of the person whose life is hereby assured, the said notes or credits and *any interest thereon* being first deducted therefrom"—and it should be so construed.

The condition to forfeit a paid up policy for non-payment of interest is repugnant to the contract or grant by which it is created, and therefore void. *Story's Eq. Juris.*, sec. 1304.

It is not a condition precedent, but a condition subsequent, and the rights of the assured became absolute. *Story's Eq. Juris.*, sec. 1306. Courts of equity give relief. *Story's Eq. Juris.*, secs. 1312, 1313, 1314, 1.

It is an universal rule in equity never to enforce either a penalty or a forfeiture. *Story's Eq. Juris.*, sec. 1319. A condition for the payment of premium after the first, is not a condition precedent, &c. *Mutual Benefit L. I. Co. vs. Hellyard, et al.*, 4 *Ins. L. J.*, 128 and 168.

A party having a ten year non-forfeiture policy, entitled to a paid up policy after four payments, part cash, part note, and the note considered an absolute payment, and the amount thereof a loan by company to insured, the



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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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policy was not forfeited by a failure to pay interest. *Ducher vs. Brooklyn L. I. Co.*, 4 *Ins. L. J.*, 812; (see "*The Reporter*," Jan. 23, 1878;) *Little vs. Northwestern M. L. I. Co.*, 5 *Ins. L. J.*, 149; (see "*The Reporter*" of Feb. 27, 1878;) *Ohde vs. The Northwestern L. I. Co.*, 40 *Iowa*, 357; *New England M. L. I. Co. vs. Hasbrook's Adm'x*, 32 *Ind.*, 447; *St. Louis Mutual L. I. vs. Grigsby*, 10 *Bush., Ky.*, 310.

GRASON, J., delivered the opinion of the Court.

It appears from the record in this case that, on the fifth day of May, in the year eighteen hundred and sixty-eight, Lewis Dietz obtained from the appellant a policy of insurance on his life for the benefit of his wife, the appellee, for the sum of two thousand dollars, the annual premium on which was one hundred and eight dollars and thirty-two cents. This policy was of the character known as a ten year policy, requiring the payment of the annual premium for ten years, at the expiration of which time the payment of premiums was to cease. Under this policy half of the annual premiums was to be paid in cash, and premium notes given for the other half. The premium notes were not to be paid until the policy itself became due and payable, when they were to be deducted from the amount secured by the policy. The interest on these notes was to be paid annually on the fifth day of May in each year, during the continuance of the policy, and if not so paid, the policy contained a provision that, the policy should become void. It contained a further provision, that, if after two or more payments of premiums were made, the policy should cease, in consequence of the non-payment of premiums, then upon a surrender of the same, the appellant would issue a new policy for the full value acquired under the old one, subject to any notes that should have been received on account of premiums; that is to say, that, if payments for two years should have been

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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made, it would issue a new policy for two-tenths of the sum originally insured; if for three years then for three-tenths and in the same proportion for any number of payments made, without subjecting the assured to any subsequent charge except the annual payment of the interest on all premium notes remaining unpaid at the time of issuing the new policy. The policy of 1868 was to become void if the insured should fail to pay the annual premium on the day appointed for its payment, or to pay, at maturity, any note (other than the annual premium notes) given for premium interest or other obligation on said policy. The insured paid part of the annual premium in cash, and gave his notes for the balance up to the 5th May, 1873, when he surrendered his policy and obtained a new policy for five-tenths of the amount originally insured, to wit, for one thousand dollars. The second policy, thus issued, states that it was so issued in consideration of the surrender of a policy theretofore issued by the appellant on the life of Lewis Dietz and of the representations made to the appellant in the application therefor, and upon the faith of which the present policy was issued, and upon the payment of the interest annually on all notes or credits given for premiums on the surrendered policy, (which notes or credits, amounting to one hundred and eighty-three dollars and ninety-one cents, are now charged against this new policy) on or before the fifth day of May in each year until said notes or credits are paid. The new policy further states that it is issued, and is accepted by the assured upon the express condition and agreement, amongst others, that if the interest upon the notes or credits shall not be paid on or before the days named in the policy for payment thereof as therein provided, the company shall not be liable to pay the sum assured, or any part thereof and said policy shall cease, and be null and void, without notice to any party or parties interested therein. This policy was issued on the fifth day of May,

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Knickerbocker Life Ins. Co. of New York vs. Dietz.

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1873, and the interest on the premium notes, then remaining in the hands of the appellant, was paid to that date, but it was not paid or tendered on the fifth day of May, 1874, and the policy was cancelled on the books of the appellant. At the time this policy was issued Lewis Dietz gave his note to the appellant by which he promised to pay the interest on the sum of one hundred and eighty-three dollars and ninety-one cents on the fifth day of May in each year, and by which he also stipulated that the loan of the aforesaid sum of money should be a proper offset, or counter claim, against any amount which might become due or payable upon the policy, and that the appellant should deduct such sum from the amount to be paid thereon, and that the failure to pay said interest at the times specified in said note, should cause the policy to cease and determine. It also appears that a short time after the 5th May, 1874, the appellee tendered the amount of interest, due on that day, to the appellant's agent in the city of Baltimore, and that he declined to receive the same. Lewis Dietz was taken sick in December, 1874, and died in the month of April, following, and due notice and proof was furnished to the appellant within proper time. The appellant declined to pay the amount of the policy and the appellee brought an action at law on the policy, but suffered a *non pros* and afterwards filed her bill in equity in the Circuit Court of Baltimore City, in which it is charged that no interest was due on the 5th of May, 1874, that the clause of the policy, by which the non-payment of interest at the time specified, was to cause the policy to cease and become null and void, was improperly in said policy and does not properly express the contract between the parties, and that it is inconsistent with the meaning and true interpretation thereof and should be rejected, and the contract should be construed as it really was, and as it is set forth in the bill of complaint; that said stipulation is in the nature of a penalty, which it is the pro-

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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vince of a Court of equity to properly construe and relieve from, and prays that a decree may be passed for the payment to the appellee of one thousand dollars, less the amount of the said notes and credits and interest due thereon, and for general relief. To this bill the appellant filed its answer under oath, by which the material averments of the bill are denied, and a commission to take testimony was issued, under which the appellee was the only witness examined. Her answers to the third, ninth and thirteenth interrogatories, so far as they gave the statements made to her by her husband, were excepted to as hearsay, but do not appear to have been passed upon by the Circuit Court, nor do we consider them as material to the determination of this case. The decree below was in favor of the appellee, and from it this appeal was taken by the Insurance Company.

The main question presented by the record and argued by the solicitors of the respective parties is, has a Court of equity jurisdiction of such a case as this? The answer to this question depends upon the further question, whether the *time* for the payment of interest in contracts of insurance of life, is of the essence of such contracts or not? It has been urged in argument that the clause of forfeiture, contained in the policy as well as in the note given by Lewis Dietz, given at the time the policy was issued, is in the nature of a penalty against which a Court of equity ought to relieve, and that the appellant can be compensated for not receiving the interest at the time stipulated for its payment, by the allowance of interest thereon during the time of default, and several cases have been cited in support of this proposition. We have carefully examined the authorities referred to, and find that very few of them touch this point, the question in most of them being whether or not the insured was entitled to a paid up policy after a forfeiture of the original one, for an amount in proportion to the sum of the premiums paid.

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Knickerbocker Life Ins. Co. of New York *vs.* Dietz.

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The case of *St. Louis Mutual Life Ins. Co. vs. Grigsby*, 10 *Bush.*, 310, is, however, directly in point, and it was held in that case that the forfeiture was in the nature of a penalty against which a Court of equity would relieve, and the company was held liable. This case was followed by one or two others in Kentucky and other States. While entertaining great respect for the learned Court by which this decision was rendered, we cannot concur in its view of the law upon this subject. While there are some forfeitures against which a Court of equity ought to, and will relieve, it will be found that they are of such a character that the *time* of payment is not of the essence of the contract, and for failure to comply at the day full compensation can be made. But in contracts of life insurance time is of the very essence of the contract. The theory on which the amount of the premium is fixed, as is well said in the brief of the appellant's attorney, is, that assuming that a man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as, invested annually at a certain rate of interest and compounded, will, at the expiration of that time, amount to enough to pay the policy and cover the expense of the company. To accomplish this result the premium must be punctually paid and invested, and the interest re-invested at the assumed rate. Otherwise the ability of the company to pay the policy, instead of being a matter of reasonable certainty, becomes a mere matter of chance, the business of life insurance ceases to have any scientific or accurate basis, and a policy of insurance becomes a mere wager on the life of its holder. The prompt payment of interest on premium notes is as necessary to the successful working of an insurance company, as well as to the security of the insured, as are the payment of the premium notes themselves. If one policy holder can fail to pay his interest, any number of them may do the same, and

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Knickerbocker Life Ins. Co. of New York vs. Dietz.

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the ruin of the company would be the inevitable result. The time for payment of interest on premium notes, therefore, is of the essence of contracts of insurance. Such contracts must be strictly complied with, and Courts of equity cannot exercise a dispensing power over them, without defeating the ends and objects of one or both of the contracting parties. All the authorities hold that the right to keep the policy alive by the payment of the stipulated premium, is a privilege secured to the insured by his contract. And in *Grigsby's Case*, before referred to, the Court say, "this privilege he may exercise or abandon at his discretion. But if he does abandon it, those beneficially interested cannot complain that the insurer refuses longer to be bound by a contract, that has lost all the elements of mutuality." Then why will not the failure to pay the *interest* on premium notes, at the day named in the policy produce the same result? In this case there was no charge upon the insured, other than the payment of the interest on the premium note on the day named in the policy, and in it was the express stipulation assented to by the insured by an acceptance of the policy, and reaffirmed in the premium note given, that the policy should become void if there was a failure to pay the interest on the premium note on the day named therein. Upon the failure to pay at the day named the contract between the parties was at an end, and it was so treated by the appellant.

In support of the views herein expressed we refer to *Patch and Wife vs. Phoenix Mutual Life Ins. Co.*, 44 *Vermont*, 488; *Anderson vs. St. Louis Mutual Life Ins. Co.*, decided by the Circuit Court of the United States for the Western District of Tennessee and reported in 5 *Bigelow's Life and Accident Ins. Reps.*, 531, 532; *Russum vs. St. Louis Mut. Life Ins. Co.*, 5 *Bigelow*, 245, 246; *Nettleton vs. St. Louis Life Ins. Co.*, 6 *Ins. Law Journal*, 428.

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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The decree appealed from will be reversed, and the bill of complaint dismissed.

*Decree reversed, and  
bill dismissed.*

(Decided 19th June, 1879.)

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THE FIRST NATIONAL BANK OF HAGERSTOWN, Garnishee of JOHN D. NEWCOMER *vs.* SUSAN WECKLER.  
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SUSAN WECKLER *vs.* THE FIRST NATIONAL BANK OF HAGERSTOWN, Garnishee of JOHN D. NEWCOMER.

*Attachment on Judgment—Clerical error—Amendment of writ by order of Court—Nul tiel record—Practice in Court of Appeals—When clause of Scire Facias in writ of Attachment and notice to defendant in the Judgment, unnecessary—When an Appeal will not lie—Construction of the Act of 1874, ch. 45, relating to Attachments—Employer as garnishee—What does not constitute a variance.*

The recital in an attachment on judgment issued out of the same Court in which the judgment was recovered and remained of record, that the judgment had been recovered at a Court begun and held on the second Monday of *March* instead of the second Monday of *February*, is a mere clerical error which it is the duty of the Court to correct by ordering the writ to be amended.

If a party intend to have the decision of the Court below on a plea of *nul tiel record*, reviewed in the Court of Appeals, he must tender a bill of exceptions setting forth the record offered in evidence under the plea, the ruling of the Court with respect to it, and the exception thereto.

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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When an attachment by way of execution is issued within three years from the date of the judgment, a clause of *scire facias* in the writ as to the defendant in the judgment, and notice to him are not necessary.

No appeal lies from a judgment refusing to quash an attachment.

Under the Act of 1874 ch. 45, if an employé contract a debt exceeding one hundred dollars, or has a judgment recovered against him for more than that sum exclusive of costs, his creditor may issue an attachment upon it, and that attachment may be laid in the hands of his employer, and if his wages or salary due at the time or that may accrue due before the trial, are in excess of one hundred dollars, then *such excess* shall be affected by the attachment, and shall be liable to condemnation. And if an employer as garnishee disregards such an attachment, and after it is laid in his hands and before trial, pays over the accruing wages or salary in excess of one hundred dollars to the employé, he does so at his peril.

The record of a judgment on which an attachment was issued, showed that the verdict was rendered at November Term, 1875, and that a motion for a new trial was immediately made before the judgment was entered on the verdict. This motion was not disposed of until the following February Term, when it was overruled and judgment on the verdict was then rendered. The writ of attachment recited that the judgment was recovered at the February Term. **HELD:**

That no judgment could properly have been rendered until the motion for a new trial had been disposed of, and there was consequently no variance between the writ of attachment and the judgment.

**APPEALS from the Circuit Court for Washington County.**

The cases are stated in the opinions of the Court.

The causes were argued before BARTOL, C. J., BOWIE, MILLER and ROBINSON, J., for the plaintiff, and submitted for the garnishee.



First National Bank of Hagerstown, Garn. *vs.* Weckler.

*Albert Small and George Schley* for the garnishee.

There is but the simple issue: Did the attachment, when laid in the hands of the garnishee, reach salary not then earned, and so not *in esse*?

An attachment on judgment as authorized by the Code, Art. 10, sec. 30, is in all its essential features. *a. fi. fa.* *First National Bank of Baltimore vs. Jagers*, 31 *Md.*, 48, and cases there cited. So, independently of the statute, it cannot reach wages, or any other right or property not yet in existence.

The Code, Art. 10, sec. 36, providing that an attachment shall not affect wages or salary not actually due at the date of its issue or levy, does not, therefore, declare a new principle; but, inasmuch, as it is held under our attachment system that the writ reaches all property, rights and credits intermediate the issue of the writ and the time of trial, it recognizes the non-liability of wages not earned, and wages not due, and fixes a limitation for exemption of that actually due. The construction of this section, the Act of 1854, ch. 23, as amendatory of 1852, ch. 340, is given in *Moore, et al., Garn. vs. Heaney*, 14 *Md.*, 558.

Before this action, however, the Act of 1874, ch. 45, was passed, which, by sec. 1, "amends" and "re-enacts" sec. 36, of Art 10, of the Code.

The plaintiff's right of action then depends upon this Act. And this amendatory Act, without changing the intent, the scope or the operation of the law, enlarges the exemption, and the more effectually to secure this exemption, it expressly limits the *right to issue* an attachment to cases where the judgment is for an amount greater than the amount of the exemption, and that against wages actually due.

The intent of the law, as thus amended, is fully disclosed in *Keyser vs. Rice*, 47 *Md.*, 212, in which this Court says: "In the Code of Public General Laws, Art. 10, sec.

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First National Bank of Hagerstown, Garn. vs. Weckler.

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36, title 'Attachments,' it was enacted that no attachment should lie against the wages or hire of any laborer or employé not actually due at the time of the attachment, and the sum of ten dollars," &c. \* \* The Act of 1874, ch. 45, is but an assertion of the same power in the promotion of the same policy. By this latter Act, the 36th sec. of Art 10, of the Code is repealed, and in its place is the amendment extending the exemption to one hundred dollars.

"From considerations of public convenience, the Courts have long since decided, that attachments would not lie against the salaries of public or municipal officers, and the same principles enlarged, have determined the Legislature to exempt the wages of employés of private persons and corporations." (47 Md., 213.)

The policy here indicated is made manifest in this, that unless wages were thus protected, it would be difficult, indeed almost impossible, for private persons or corporations to retain their employés; they would leave their employ as soon as they ascertained that their salary or wages could or would be impounded by an attachment issued.

There is no opportunity for the introduction of a strained construction of the Act, nor to invoke the great canons of interpretation. The simple provisions are—

1st. That no attachment *shall issue* to affect wages, "unless the debt or judgment \* \* shall \* \* exceed the sum of one hundred dollars." This provision follows, as well from the explicit language of the Act, as from the specific exemption of wages accrued due to that amount.

2nd. In cases in which attachments *may issue*—upon judgments in excess of one hundred dollars—that *amount of wages due shall always be exempted* from the effect of the attachment.

3rd. The writ can reach only such sums, in excess of one hundred dollars, as may at any time become due and remain unpaid in the hands of the garnishee, during the period intervening the levy and the trial.

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First National Bank of Hagerstown, Garn. vs. Weckler.

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The application of this Act to the case at bar is obvious.

The judgment being in excess of one hundred dollars, the writ could properly issue. There being no lands, tenements, goods, chattels or credits of the defendant in the hands of the garnishee at the time of the levy, she so far took nothing by her writ.

There being, at no time between the levy and the day of trial, in the hands of the garnishee, a sum in excess of one hundred dollars of the salary of the defendant, there was nothing upon which the attachment could take effect.

*H. H. Keedy* for Mrs. Wecker, the plaintiff.

The main question in this appeal is the construction of the Act of 1874, chap. 45. This Act by its title repeals section 36 of Article 10 of the Code of Public Gen. Laws, and re-enacts the same with an amendment. The first section of the Act recites, that section 36 be, and is hereby, amended and re-enacted so that the same read as follows: Then follows the law as amended: "No attachments upon warrant, judgment upon two *non ests*, or upon original process, shall issue against, be levied on or affect the wages or hire of any laborer or employé not actually due at the date of such attachment in the hands of the employers, whether such employers be individuals or corporations, unless the debt or judgment upon which such attachment is issued, shall, exclusive of costs, exceed the sum of one hundred dollars." These words can have but one meaning. There is no ambiguity about them. They are plain. They may be transposed and changed in their order, and any grammatical construction given them, and any rule of interpretation applied, they will still mean that no attachment can affect wages not actually due at the date of the attachment, unless the debt or judgment upon which it issues exceeds, exclusive of costs, \$100. In other words, that if the debt or judgment does exceed \$100, the attachment can issue, and can affect wages as any other credits, leaving, however, \$100 exempted.

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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The Court in *Wilson vs. State*, 21 Md., 1, in construing an Act of Assembly, says, "*the words of the Act are first to be resorted to, and if these are plain in their import, they ought to be followed.*"

*Dwarris on Statutes*, 703, says: "When the Legislature has used words of a plain and definite import, it would be very dangerous to put upon them a construction which would amount to holding that the Legislature did not mean what it has expressed."

In the case of *Maxwell vs. State*, 40 Md., 292, the learned Chief Justice, in speaking of the Assessment Law, says: "There has evidently been some mistake or omission, and we are asked to correct the mistake or supply what has been omitted, in order to make the Act express what we suppose to have been the intention of the Legislature, we certainly have no power or authority to do so." The Court, adopting the language of TENTERDEN, C. J., say in effect, that it would be better to defeat the object of an Act, than to put upon it a construction not warranted by its words, in order to give effect to that which may be supposed to have been the intention of the Legislature.

It is not the province of the Court to make laws, or to supply omissions, but to interpret them as made by the law-making power. *Maxwell, et al. vs. State, &c.*, 40 Md., 273; *Scaggs vs. Balt. and Wash. R. R. Co.*, 10 Md., 268; *Wilson & Phillips vs. State, &c.*, 21 Md., 1; *Clark vs. Mayor & C. C. of Balt.*, 29 Md., 277; *Alexander vs. Worthington, et al.*, 5 Md., 471; *Hawbecker, et al. vs. Hawbecker, et al.*, 43 Md., 516; *Annan vs. Houck*, 4 Gill, 332.

It is contended that the law repealed can be resorted to in aid of the interpretation of the new law. This is admitted, if there is any ambiguity, or if the language of the new law is susceptible of different interpretations. Aside from the plain words of the Act under discussion, it cannot be maintained that the intention of the Legislature was only to increase the exemption from *ten to one*

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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*hundred* dollars, and leave the law as it was in other respects. If such was the intention, the language used was most unfortunate. That purpose could have been accomplished simply and most effectually, by substituting the words "*one hundred*" in the place of the word "*ten*," and by adding the proviso, that it should not apply to any existing contracts or debts. This not being done, is evidence that this was not the intention of the Legislature.

The history of the Act of 1874, chap. 45, and the causes which lead to its enactment, are known; whilst it was supposed to be for the benefit of the laborer, it was passed at the instance of corporations and employers. They, and not the employed, demanded it. They were continually annoyed by the serving of small attachments issued by justices of the peace. It had become not only annoying, but vexatious. To stop these attachments was the chief purpose of the law. Attachments issuing out of the Circuit Courts were not so objectionable, for the reason that the corporations, such as railroads, had their attorneys in every county, where they would transact business, who, without inconvenience, could answer said attachments.

Courts have decided, from considerations of public convenience, and that the successful operations of government might not be hindered or delayed, that salaries of public officers shall not be attached. (8 *Md.*, 95.) "*And the same principles enlarged,*" have induced the Legislature to so change and modify the law, that the operation and business of private corporations and individuals, might not be too much interfered with; hence, the Act of 1874, chap. 45, which practically abolishes the issuing of attachments by justices of the peace. *Keyser vs. Rice*, 47 *Md.*, 213; *Mayor and C. C. of Balt. vs. Root*, 8 *Md.*, 95.

While the primary object of the law was to benefit the employers, and especially corporations, yet the Legislature did not seem to be unmindful of the laborer. He

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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receives an exemption of \$100. The man of small earnings and of small debts is protected, but not he who receives a large salary.

MILLER, J., delivered the opinion of the Court.

It appears from the records in these cases that Susan Weckler, on the 10th of March, 1876, recovered a judgment in the Circuit Court for Washington County, against John D. Newcomer for \$973.66 with interest and costs, and on that judgment she caused to be issued out of the same Court an attachment by way of execution. The attachment was issued on the 30th of June, 1876, and Newcomer being in the employ of the First National Bank of Hagerstown at a salary of \$1000 per annum, the writ was on the same day laid in the hands of the bank for the purpose of reaching this salary. The garnishee appeared and pleaded first that there was no such judgment as the writ of attachment sets out. The plaintiff then moved for leave to amend the writ by striking out the word "March" and inserting "February." From this we understand, that the writ as issued had erroneously recited, that the judgment had been recovered at a Court begun and held on the second Monday of *March* instead of the second Monday of *February*. The Court treated this as a mere clerical error, granted the leave to amend and the error was corrected. The writ having been issued out of the same Court in which the judgment was recovered and remained of record, this error of date in the recital of the writ was manifestly a mere clerical error, and was apparent on the records of the Court. In such case it was not only competent to, but the duty of the Court to order the amendment to be made. The decision in *McCoy, Garn. of Dewey vs. Boyle*, 10 *Md.*, 391, is directly in point, and that case is not in conflict with anything decided in *Halley, Exc'r of Kulp vs. Jackson, et al.*, 48 *Md.*, 254. After this it appears from the docket entries that

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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the plea of *nul tiel record* was renewed, and that on this plea the Court gave judgment for the plaintiff. To the judgment of the Court on this plea, whether it was given before or after the writ was amended, no exception was taken by the defendant. The result of this is that the Court's action on this plea is not before us for review, for it is well settled that if a party intends to have the decision of the Court below on a plea of *nul tiel record* reviewed in this Court, he must tender a bill of exceptions setting forth the record offered in evidence under the plea, the ruling of the Court with respect to it, and the exception thereto. *McKnew vs. Duvall*, 45 *Md.*, 506.

The garnishee then moved to quash the attachment upon the ground that the writ, as appears by the return of the sheriff, had not been made known to Newcomer, the defendant in the judgment. If this objection was founded upon the case of *Johnson vs. Lemmon*, 37 *Md.*, 336, where it was held that the writ was defective because it did not contain a clause of *scire facias* as to the defendant in the judgment, the answer is that in that case the attachment was issued more than three years after the date of the judgment, and it is only in such cases that a clause of this character and notice to the defendant in the judgment is required by the Act of 1862, ch. 262. That such a clause is not necessary where an attachment by way of execution is issued within three years from the date of the judgment was expressly decided in *Anderson vs. Graff*, 41 *Md.*, 606. Whether since the Act of 1874, ch. 320, it is necessary to insert such a clause in any case where the attachment is issued within twelve years from the date of the judgment, may be a matter of doubt, and is a question we do not propose now to decide. We are not aware of any statutory provision or of any decision which requires such a clause in the writ, or such notice to be given to the defendant in the judgment, in a case like the present, where the attachment was issued within three years from the date of

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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the judgment, and the motion to quash was properly overruled.

The attempt has been made to bring up the questions which we have thus considered and decided, by a separate appeal and a separate record, (which is No. 7 on the General Docket) but as no bill of exceptions was taken to the decision of the Court upon the plea of *nul tiel record*, and as it is clear that no appeal lies from a judgment refusing to quash an attachment, (*Baldwin vs. Wright & Kent*, 3 Gill, 341; *Mitchell vs. Chesnut, et al.*, 31 Md., 521,) it is plain that this appeal must be dismissed, and it is so ordered.

*Appeal dismissed.*

(Decided 19th June, 1879.)

In the next record it appears that the case was tried before a jury upon issue joined on the plea of *nulla bona*. The proof shows that on the 30th of June, 1876, when the attachment was laid, nothing was due to Newcomer by the bank on account of his salary, but between that time and the day of trial, the 18th of May, 1878, over \$1800 would have been due to him if the bank had not paid his salary monthly; that in consequence of this monthly payment there was from the laying of the attachment to the day of trial not more than \$83.33½, due to him at any one time. Upon this proof prayers were offered on both sides. Those on the part of the plaintiff assert the proposition, that as the judgment on which the attachment issued exceeded the sum of \$100, all the money which became due and payable by the bank to Newcomer on account of his salary from the time the attachment was laid to the day of trial, (less the sum of \$100, which is by law exempted,) was liable to and affected by the attachment, and the fact that his salary since the laying of the attachment has been paid him by



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First National Bank of Hagerstown, Garn. vs. Weckler.

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the bank, is no bar to a recovery. Those of the garnishee assert that the attachment affects only such wages or salary in excess of \$100, as were actually due him at the time it was laid. The two Judges before whom the case was tried being divided in opinion, the prayers on both sides were rejected and each party took an exception. The verdict was in favor of the plaintiff, but for a sum which evidently did not include any part of the salary, and both parties have appealed.

The question thus presented is of importance, and involves the construction and effect of the Act of 1874, ch. 45. It had long been the settled construction of our attachment laws, that the attachment fastened upon and subjected to condemnation not only all the credits or property of the debtor in the hands of the garnishee at the time it was laid, but, also, all such credits or property as might afterwards come to his hands down to the time of trial. All wages or hire of laborers or employés in the hands of their employers were like all other credits, unquestionably within the operation of these laws and this construction of them. This was supposed by the Legislature, to operate harshly upon such debtor parties, and by the Act of 1852, ch. 340, entitled "An Act to limit attachment cases where laid in the hands of employers," and afterwards by the amendatory Act of 1854, ch. 23, both of which are embodied in sec. 36, Art. 10, of the Code, it was provided that "no attachment of the wages, or hire, of any laborer or employé, in the hands of the employers, whether private individuals or bodies corporate, shall affect any salary or wages of the debtor *which are not actually due at the date of the attachment*, and the sum of ten dollars of such wages or salary which *may be due* shall be exempted from attachment, whether on warrant or on judgment." Without doubt, this legislation was in the interest and for the benefit of laborers and other employés. It prevented the operation of an attach-

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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ment upon all wages that might become due after it was laid and before trial, and granted an absolute exemption to the extent of ten dollars of the wages, or hire, due at the time it was laid. So stood the law until the passage of the Act of 1874, ch. 45. By that Act, sec. 36, Art. 10, of the Code was amended and re-enacted so as to make it read that "No attachments upon warrant, judgment upon two *non ests*, or upon original process, shall issue against, be levied on, or affect the wages or hire of any laborer or employé not actually due at the date of such attachment, in the hands of the employers, whether such employers be individuals or corporations, *unless the debt or judgment upon which such attachment is issued, shall, exclusive of costs, exceed the sum of one hundred dollars* ; and the sum of one hundred dollars of such wages, or hire, due to any laborer or employé by any employer or corporation *shall always* be exempt from attachment by any process whatever." Now, when we read this law in connection with the section of the Code which it amends, the changes made are, in our opinion, these: 1st. It plainly increases the amount absolutely exempted from ten to one hundred dollars. This certainly was intended to benefit the laborers or employés. 2nd. It prohibits the issuing, as well as the levying, of an attachment to affect wages which may become due after its date, where the debt, or judgment, on which it is founded does not exceed one hundred dollars. The effect of this, in connection with the increase of the absolute exemption, is to relieve employers from the annoyance and inconvenience of having attachments on small debts and magistrates' judgments laid in their hands, to affect the future wages of their employés. The practical result is that railroad corporations, who have a large number of persons in their employ, are, in a great measure, relieved from the trouble of all *such attachments*, because, in a large majority of cases, the wages of any one of their employés are at no time, in arrear to the amount of

First National Bank of Hagerstown, Garn. *vs.* Weckler.

one hundred dollars, and to give such corporations this relief is, probably, one of the objects the Legislature had in view in passing this Act. 3rd. But, if the debt, or judgment, exclusive of costs, on which an attachment is issued exceeds the sum of one hundred dollars, then the effect of the attachment to bind wages accruing due after its date, and down to the time of trial, is restored to what it was previous to any legislation on this subject, with the exception, that the amount of one hundred dollars of *such wages* is to be exempted from such effect. We are unable to give any other construction to the language of this law. The section of the Code had *limited in all cases*, the effect of an attachment against wages to the amount due at its date, and by the amendatory Act, the Legislature have said the same limitation shall continue "*unless* the debt, or judgment, on which such attachment is issued shall, exclusive of costs, exceed the sum of one hundred dollars." It seems to us, that this purpose is plainly expressed. If the intent was to continue the limitation in all cases, as it had previously existed, the language just quoted was entirely unnecessary and has no meaning. Being in the law, the Courts must give to it its ordinary, natural and necessary import and meaning in the connection in which it is used. What we understand the Legislature to have declared by this Act is, that if an employ  contracts a debt exceeding one hundred dollars, or has a judgment recovered against him for more than that sum, exclusive of costs, his creditor may issue an attachment upon it, and that attachment may be laid in the hands of his employer, and if his wages, or salary, due at the time, or that may accrue due before the trial, are in excess of one hundred dollars, then *such excess* shall be affected by the attachment and shall be liable to condemnation. That being, in our judgment, the true construction and effect of this statute, it is hardly necessary to add that if an employer, as garnishee, disregards *such* an attachment, and after it

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First National Bank of Hagerstown, Garn. *vs.* Weckler.

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is laid in his hands and before trial pays over the accruing wages, or salary, in excess of one hundred dollars to the employé, he does so at his peril.

Applying this construction to the case before us, it follows there was error in the rejection of the plaintiff's first and second prayers, and for this error the judgment must be reversed and a new trial awarded. In the rejection of the opposing proposition contained in the prayers of the garnishee there was of course no error. We have not considered the third prayer of the plaintiff, in reference to money alleged to be due by the bank to Newcomer, on account of commissions on the sale of the bonds to the plaintiff, because it was not relied upon by her counsel, and in the further progress of the cause it will evidently become unimportant. Another exception was taken by the garnishee in which we find no error. The plaintiff after offering in evidence the writ of attachment offered the record of the judgment on which it was issued. This latter shows that the verdict was rendered at November Term, 1875, and that a motion for a new trial was immediately made before the judgment was entered on the verdict. This motion was not disposed of until the following February term, when it was overruled and judgment on the verdict was then rendered. The writ of attachment recites that the judgment was recovered at the February Term, and this of course was correct, because no judgment could properly have been rendered until the motion for a new trial had been disposed of. There was consequently no variance between the writ of attachment and the judgment, and no error in admitting the record of the judgment in evidence.

*Judgment reversed, and  
new trial awarded.*

(Decided 19th June, 1879.)

JAMES R. WILLING and AFFRA D. MEZICK vs.  
THOMAS BOZMAN.

*Repeal of the Act of 1872, ch. 241, by the Act of 1874, ch. 181—Insufficient Pleas—Demurrer sustained—Plea in bar—Conclusion of Plea—Bad plea—Count bad as charging a separate trespass—General demurrer to Pleas—Defective count in Declaration.*

The provisions of the general Act of 1874, ch. 181, relating to oysters, being inconsistent with, and repugnant to, the provisions of the special Act of 1872, ch. 241, entitled "An Act to protect oysters within the waters of Wicomico county," the two Acts cannot stand together, and the former must be construed as repealing the latter.

The first count of a declaration charged that W. and M. the defendants, had unlawfully, wickedly and maliciously seized and taken possession of the plaintiff's boat whereby he was greatly damaged and injured. To this count the defendants pleaded the general issue, and filed separate pleas by way of justification to the whole declaration. The separate plea of the defendant W. alleged that the boat mentioned in the declaration was being used for the purpose of dredging oysters in the waters of Wicomico county, and that on being pursued the person in charge of said boat escaped, and the boat itself was taken by the defendant as deputy commander of the State Fishery Force, and delivered to the defendant M. a Justice of the Peace of said county to be disposed of according to law. The separate plea of the defendant M. alleged that the boat was delivered to him as a Justice of the Peace of Wicomico county by the defendant W. acting as deputy commander of the State Fishery Force, charged with violating the provisions of the Act of 1872, ch. 241; and that as Justice of the Peace he held the same upon said charge, to await the adjudication of the questions of law arising in connection with the condemnation of said boat. To these pleas the plaintiff demurred. **HELD:**

1st. That under the facts set forth in these pleas, the defendants were not justified in taking the plaintiff's boat, the Act of 1872, ch. 241, under which the seizure was made, having been repealed by the Act of 1874, ch. 181, and the demurrer should be sustained.

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Willing and Mezick *vs.* Bozman.

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2nd. That the plea of the defendant M. being a plea in bar, was bad, not being an answer to the whole declaration.

3rd. That the plea to have been good and sufficient, ought to have concluded by denying that the defendant "unlawfully, wickedly and maliciously" took the plaintiff's boat.

If a plea undertake to answer the whole declaration, but in fact answers a part only, the plea is bad, and the plaintiff may demur.

A count charging one of two persons with trespass, without designating which of the defendants committed the trespass, is, as a count charging a separate trespass, bad.

Where a general demurrer to pleas is sustained, the defendants are not entitled to judgment because one of the counts of the declaration is defective, the other counts being good, and sufficient to support the action.

APPEAL from the Circuit Court for Worcester County.

This suit, the nature of which is set forth in the opinion of the Court, was brought to the September Term, 1877, of Wicomico County, by the appellee against the appellants. The plaintiff on the 26th of November, 1877, declared with three counts in his *narr.*, and on the 9th of January, 1878, the defendants pleaded the general issue and three special pleas. On the same day, on suggestion of the plaintiff, the Court directed the case to be removed to Worcester County. On the 22nd of May, 1878, the plaintiff joined issue on the defendants' first plea and demurred to their second and third pleas. No reply was made to the fourth plea. On the same day, the plaintiff obtained leave to withdraw and amend his *narr.*, as to the first count, and filed his amended *narr.* Thereupon the defendants jointly filed amended pleas, one, two and three. The first plea presented the general issue; the other pleas were special. The plaintiff then withdrew and refiled the afore-mentioned replication and demurrer. On the 23rd of May, 1878, the defendants severally obtained leave to file an additional plea, which was accordingly done. "Thereupon demurrer was entered short upon the docket

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Willing and Mezick vs. Bozman.

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by consent." Whereupon the Court decided, "it appears to the Court here that the said pleas of the said defendants, and each of them above pleaded, and the matters therein contained, are not sufficient in law to preclude the said plaintiff," etc. On the same day a jury was sworn and verdict rendered for the plaintiff for \$250. The plaintiff offered two prayers, the first of which was conceded, and the other defining the measure of damages was granted. The defendants offered one prayer which was granted. On the 28th of May, a motion for a new trial was made by the defendants, and on the 8th of June following was overruled, and judgment entered on the verdict. The defendants appealed.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, and ROBINSON, J., for the appellants, and submitted for the appellee.

*John H. Handy*, for the appellants.

Was the appellant, Willing, justified by law in seizing the boat or canoe under the circumstances detailed in the special pleas?

The solution of this question depends upon several propositions. Was the appellee violating the oyster law provided for the waters of Wicomico county? He was. The Act of 1872, ch. 241, sec. 1, provides—"That it shall not be lawful for any person or persons to employ any canoe, boat or vessel in catching or taking oysters with scoop, scrape, drag or dredge, or any similar instrument, within the waters of Wicomico county," &c. The appellee, at the time he was discovered by the appellant, was employing the boat, whose seizure is the *gravamen* of this suit, in violating this law, in catching oysters in those waters with the forbidden instruments. The boat, its tackle and apparel, and all things on board at the time of the violation, was forfeited by the *act of "violating"* the

above section, and, in addition, he was liable to be fined. Act of 1872, ch. 241, sec. 3.

Now the demurrers admit that Bozman was violating this law, and the third section of the act *proprio vigore*, forfeits the boat employed in so breaking the law.

The boat, etc., by the fourth and seventh sections, is required to be seized and delivered over to the authorities of the county.

Had Willing, acting as deputy commander of the police boat, "Carrie Franklin," the right to make seizure *super visum*?

He had no warrant from a justice, and, indeed, the Act of 1872, ch. 241, makes no provision for the issuing such a warrant to the commanders of the fishery force. See *secs. 4 and 7*.

No information on oath had been made to the commander of the Oyster Police Force or deputy commander Willing, but the latter acted upon his view of the offence committed. Was he justified in so doing?

When the Act of 1872, ch. 241, was passed, the Act of 1870, ch. 364, was the general Oyster Law of the State. *By that Act the Oyster Police Force was created.*

From the whole scope and tenor of this Act, it is clear that the Oyster Police Force was intended to act independently of the justices in making arrests and seizures; and whilst they are expressly authorized *and required* to make such arrests and seizures, *super visum*, they are no where required to execute any warrant issued to them, nor is any law found for issuing such warrant.

And because it is their special duty for which they are created and paid to make such arrests and seizures, section 17 provides that they shall receive no part of the proceeds of the forfeited property.

The commanding officer acts under the sanction of his official oath, and his subordinates, under rules and regulations made by him, with the concurrence of the Board of Commissioners of the State Oyster Force. *Secs. 40 and 43.*



No information on oath was necessary or provided for in any case to authorize the commander and his sub-commanders to act.

If there was evidence to satisfy them that the person had violated the law, they were empowered to arrest, and seize the boat, just the same as if they saw the act itself.

If however some persons not belonging to the Oyster Police Force reported to the commander that a violation had taken place some time before, the commander would have sent him to a justice to get out a warrant, on oath, under section 13, directed to the sheriff, constable, owner or master of a vessel, &c. Such was certainly the original conception of the duties, powers and functions of the Oyster Police Force.

This being the state of the law, the Act of 1872, ch. 241, was passed. Justices were not authorized to issue warrants to them; but section seven provides that information on oath may be lodged with the commander, and he being an executive officer, (unlike the justice who must issue his warrant to his executive officers,) is required to proceed, on such sworn information, to arrest and seize.

Prior to that Act and section, he was only bound to act *super visum*, either of the act itself or of such evidence as authorized him to infer it.

Did this Act abrogate any of the powers he already had as a policeman, specially created to enforce the Oyster law of the State? Was he not still bound to arrest and seize on the view?

The Act of 1872, ch. 241, clearly indicates that he was to guard the waters of Wicomico, and enforce the law; and that in addition to his *duties* under the Act of 1870, ch. 364, he could be compelled to listen to informations on oath and hunt up the offender and *pursue him and his boat beyond the waters of the county*, which the constable, sheriff and military officer, under the justice's warrant, could not do.

The Act of 1872, does not repeal the Act of 1870, except so far as repugnant; they are in *pari materia*, and are to be read and construed as parts of the same article. It is a provision within the scope, powers, purposes and intention of the law creating the Oyster Police Force. It was passed with a full knowledge of the existing law, and from section seven manifestly with reference to its provisions.

It was then the intention of that Act that in addition to the powers given to the Police Force by the Act of 1870, it should be compelled to act on sworn information, in so far as Wicomico County was concerned.

Unless, then, some other and subsequent legislation has affected the question, it would seem the appellant Willing, had not only the right, but it was his duty to arrest the offender and seize the boat employed, *super visum*.

Now what change does the Act of 1874, ch. 181, make? Though it changes much of the law with regard to oysters, and the punishment for violating the Oyster Law, it does not seem materially to change the general powers of the Oyster Police Force. It takes away none of its duties or powers, but adds to the Force itself, and to its powers and duties.

The Act of 1874, chap. 181, does not, in terms, repeal the Act of 1872, ch. 241. On the other hand, it expressly states in the title and repealing clause what it does repeal, viz., the Acts of 1870, ch. 364, and 1872, ch. 167. The Acts of 1872 were not overlooked. One of them was repealed.

If, then, the Act of 1872, ch. 241, is repealed by the Act of 1874, it is by *implication*. To work such a repeal the repugnancy must be so great that the two Acts cannot stand together. *Mayor, &c., of Cumberland, et al. vs. Magruder, et al.*, 34 Md., 381; *State vs. Northern Central Railway Co.*, 44 Md., 131.

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Willing and Mezick *vs.* Bozman.

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It will not be held that a prior law is repealed by a subsequent one, containing no express words to that effect, unless the implication should leave no reasonable doubt that such was the intention of the Legislature. The necessary implication to repeal an Act must be as certain as an express repeal. 13 *U. S. Digest*, 595, *Plac.*, 34, cites *The United States vs. Twenty-five Cases of Cloths, Crabbe*, 356.

On the other hand, all Acts in *pari materia* are to be taken together as if one law. *McCartee vs. Orphans' Asylum Society*, 9 *Cowan*, 506-507.

There is no such repugnancy or inconsistency between the two Acts, as the appellee supposes. It is not impossible for them both to stand. *It is purely a territorial question.* The inconsistency between the Acts of 1870 and 1872 was as great as that between the Acts of 1872 and 1874.

The Act of 1874 must be read as subject to any local law on the subject, found on the statute books; and so read, the two form parts of one system, and may easily stand together, and be enforced by the same police.

It is true that the Act of 1874 was intended as a revision and substitute for the Act of 1870, and would probably have repealed it by implication had the repeal not been express; but it was not a revision of the Act of 1872, chapter 241, nor intended as a substitute for it. The Act of 1872, ch. 241, is therefore in force, and the acts of the appellant, Willing, were justified by his office under that Act.

The Court, therefore, erred in sustaining the demurrers to all the pleas which properly plead that defence.

But if the Act of 1874, ch. 181, repealed the Act of 1872, ch. 241, still Willing was clearly entitled *super visum*, to arrest the appellee, who was violating the Act of 1874. He was dredging in waters where dredging was forbidden by that Act. *Act of 1874, ch. 181, sections 1, 2, 5 and 8.*

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Willing and Mezick *vs.* Bozman.

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The license to dredge is confined to the waters of the Chesapeake and Eastern Bays, and does not extend to Wicomico river, where the pleas allege the violation took place. To dredge there was a violation of the Act of 1874; and section eight of that Act expressly requires the deputy commander in that district to arrest the person found offending. Now, that is what Willing attempted to do. The offender left his boat and escaped arrest. Was it a trespass in Willing, finding the boat left without a crew, floating without control in the waters of the river, to take her into his possession, and conduct her to a safe place?

Non-residents, by the Act of 1874, are not allowed to take out license to dredge in Maryland waters, and boats owned in whole or in part by them are forbidden to be so used. Sections 2-11.

“Any boat, owned wholly or in part by any non-resident, used in catching oysters in this State, with scoop, dredge or similar instrument, shall be condemned by order of any Judge nearest the place of her capture \* \* and shall be sold by the sheriff,” &c. Section 11.

Now the deputy commander had the right, under these provisions, to arrest the offender. If that offender escaped before the deputy could ascertain whether the boat was or was not owned, wholly or in part, by a non-resident, had he not clearly the right to take the abandoned boat, and deliver the same over to the authorities to await the determination of that question, and “to be disposed of according to law?”

Under the Act of 1874, the Justice had the right to issue a warrant for the offender, and, bringing him before him, ascertain whether he was or was not the owner of the boat, and whether she was owned in whole or in part by a non-resident. Until that was done, it was manifestly impossible to tell whether the boat was forfeited or not. To hold that the deputy commander was guilty of a tres-

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Willing and Mezick vs. Bozman.

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pass, for arresting and handing the boat over, that the fact might be ascertained whether it was liable to condemnation, would render the law nugatory in the great majority of cases where the law was being violated by boats owned by non-residents.

The officer, then, in the original capture committed no trespass, nor did he, in leaving the boat with the magistrate, who might deal with the offender and ascertain whether it was liable to be forfeited. The officer could not know the ownership of the boat until he inquired of those on board. The persons in possession fled, and left him no way of finding out that fact and fully discharging his duty under the law, except by seizing it. It was Willing's duty to seize the boat.

But if the Act of 1872, ch. 241, was unrepealed, then the appellee has forfeited "the canoe, boat or vessel, in his possession, together with all her tackle and apparel, and all things on board at the time the offence may have been committed."

By his demurrer he admits that he was violating the first section of the Act of 1872, ch. 241, if it was in force. It is by the act of violating the law that the forfeiture is worked. It requires no decree, because the party in this case admits the fact. The title to the property is divested by the commission of the offence. *Bump's Internal Revenue Law*, 100; *U. S. vs. 56 bbls.*, 4 *I. R. R.*, 106; *U. S. vs. 46 casks*, 5 *I. R. R.*, 161.

If, then, the appellee had violated the law, his title to the boat ceased *ipso facto* by such offence. He then had no title to the possession, nor rights in the boat, which could be the subject of trespass by the appellants.

The second, third, fourth and fifth pleas all show that if any trespass were committed, there were two several and distinct trespasses committed successively by Willing and Mezick. If Willing was a trespasser, it was in the capture and detention, till he delivered the boat to Mezick.

If Mezick was a trespasser, his trespass was a separate and distinct act from that of Willing. The trespasses were, therefore, several and successive, and not joint. Neither of the defendants had anything to do with the act of the other, yet the *narr.* avers a joint trespass laid on a particular day. The pleas then, were good, even upon the hypothesis that trespasses had been committed by the defendants. They could not be sued jointly for several and distinct trespasses. Under this *narr.* one of the defendants might be held for a trespass in which he was not concerned. *Waterman on Trespass*, sec. 73, note; *Sedley vs. Sutherland*, 3 *Esp.*, 202.

The demurrer mounts to the first error in pleading. It was, therefore, the duty of the Court to pronounce upon the *narr.* If that were bad, judgment on demurrer should have been rendered for the defendants, at least, as to such count or counts as might be faulty.

The first count of the *narr.* is bad, because it embraces, at least, two distinct causes of action.

And though after plea of not guilty, had the cause gone to the jury on that issue, without the interposition of a demurrer to the pleas, the verdict might have cured the defect, yet no such effect could be worked in the face of a demurrer, notwithstanding the demurrant is the plaintiff. In demurring to the pleas or any of them, he asserts the soundness of his *narr.* and necessarily puts that issue to the Court.

The first and second counts in the *narr.* charge a joint trespass. The third count alleges a several grievance, and does not identify which defendant committed it. It can scarcely be permissible in pleading, even under the most liberal of modern relaxations, to join a several and joint action in the same *narr.* And if it were a *general verdict would be bad.*

But in this count, it is not stated which one of the defendants committed the alleged grievance. It was bad

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Willing and Mezick vs. Bozman.

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for uncertainty, and under the demurrer, judgment should have been rendered on that count for the defendants.

The first count in the *narr.* charges that the defendants "*maliciously seized and took the said boats.*" Now by this unnecessary averment, the plaintiff made the malice the gist of the action. Any plea therefore that confessed the taking and denied the *malice* was a good plea, and ought not to have been overruled. The second, third, fourth and fifth pleas of the defendants deny the malice, and they are all pleaded to the first count of the *narr.*

After the severance on the part of the defendants as to the fourth and fifth pleas, although up to that point only the second and third pleas had been demurred to, a demurrer was entered short upon the docket by consent. This must have covered *all the pleas*; for the Court, in deciding upon it, says, "that the said pleas of the said defendants, *and each of them* above pleaded, and the matters therein contained are not sufficient in law," &c.

If the first plea were embraced in this decision, then *there was no issue left to be tried by the jury*, and there should have been an interlocutory judgment for the plaintiff for want of a plea. Such interlocutory judgment should appear by the record, and the finding a verdict and assessment of damages by the jury when there was no issue to try, and no interlocutory judgment, was error. *Griffith, et al. vs. Lynch, Garn. of Hall & Lynch*, 21 Md., 578.

Was the original fourth plea withdrawn? There seems, from the record to be some doubt as to whether it was withdrawn, or still remained in the case after the amendments. If it did, the only way in which it was replied to was by the demurrer entered short by consent. If that demurrer did not cover all the pleas, and the fourth plea was not withdrawn, then the plea was not answered at all.

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Willing and Mezick *vs.* Bozman.

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*James U. Dennis, Robert F. Bratton and Henry Page*  
for the appellee.

The numbering of the new pleas, and the fact that they go to the whole declaration, show that they were intended by the defendants below to be in substitution of the first pleas. That upon the filing of these new pleas, the replication was *withdrawn* and refiled, proves that the plaintiff treated them as withdrawn; and that the Court below permitted the case to go to trial without its being at issue, clearly demonstrates that it treated these pleas as out of the case. Now the mere filing of *additional* pleas is not to be considered a withdrawal of the first pleas. *Gardner vs. Miles, 5 Gill, 98.* But when the record shows that the Court and counsel on both sides, at the trial below, have acted in a way that proves that they considered they were withdrawn, are not the defendants estopped from denying it here, and ought not this Court to determine that they were withdrawn? And is not this view strengthened by the fact, that they "are pleadings which have been amended, form no part of the record, and *ought* to have been withdrawn from the case upon filing the amended pleas." *Norwood vs. State, 45 Md., 76.*

What did the demurrer cover? Manifestly not the first plea; upon this the plaintiff joined issue. Any decision the Court below rendered could not have been to a general issue, plea not demurred to; the plaintiff could not demur and plead to the same count. Therefore, the words, "the said pleas of the said defendants, and each of them pleaded, and the matters therein contained, are not sufficient in law to preclude," &c., could only refer to such pleas as the Court had been called to pass upon; and the pleading in the case prevented the Court from considering the defendant's first plea. This Court cannot find from this record that the first plea was covered by the decision on the demurrer, and it ought not to come to such a conclusion, unless no other construction of the terms of the record be possible.



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Willing and Mezick vs. Bozman.

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What, then, did the demurrer cover? It was "entered short on the docket by consent;" whatever confusion exists, as to what it covered, is due to the fact that it was "entered short." Now when it was entered, the state of the pleadings was this: the *narr.*, with its several counts, the defendants' numerous pleadings, and the plaintiff's replication to a part of the defendants' pleas. That replication joined issue on the defendants' first plea, demurred as to the second and third pleas, and the fourth plea was unanswered. By agreement, a demurrer was to be entered *short*. Demurrer what to? It were unreasonable not to suppose, to *all* that remained of the defendants' pleadings, not already answered. The entire pleading of the defendants had to be answered, and the very object in putting in an additional replication, was to supply the omissions made by the original replication. It was entered *short* on the docket by consent, and we submit that this Court ought not allow this "shortness" to be urged to the prejudice of the appellee. If it had been written out formally, the demurrer would have contained words sufficiently explicit to show that it was intended to cover all the pleas not already answered by the first replication.

In point of fact, the original pleas were withdrawn by the defendants and are, therefore, improperly in the record; and the demurrer entered short was intended to extend to the defendants' entire pleading, except his first plea; and the Court's decision did not cover this first plea, and the case did go to trial upon the issue tendered by the defendants' first plea, and accepted by the plaintiff's first count in the replication.

The appellants' counsel contends that Willing's powers, as an officer, can be determined by the provisions of Act of 1870, ch. 364, and argues: 1st. That the Act of 1874, ch. 181, repealing this Act, does not seem materially to change the general powers of the Oyster Police Force. And 2nd. That the Act of 1874, does not repeal the Local Act of 1872, ch. 241.

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Willing and Mezick vs. Bozman.

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1st. Does the Act of 1874, ch. 181, repeal the Act of 1870, ch. 364, and change the general powers of the Police Force? In answer, it is submitted that it absolutely repeals the Act of 1870, and entirely abolishes the Force created by such Act, and establishes an entirely new Force, with different powers, to be called by a different name. Not a vestige of the power of the present Oyster Force can be referred to the Act of 1870, that Act being repealed in terms, everything under it is swept away. For the purpose of construing later Acts, it may be referred to as affording some light, but as a potent living Act, it is as much out of existence as if it never had been passed. Any argument, therefore, which assumes that it has had any vitality for any purpose, save the passage of the Act of 1874, is radically defective. If this be so, Willing, at the time of the acts alleged by the *narr.*, could derive no powers in the enforcement of the Act of 1872, from the Act of 1870; the very breath of his existence as an officer was derived solely from the Act of 1874. Now, if this last Act gave him no power to seize property, he had none. The Act of 1872 confers upon him no powers at all; it simply imposes the duty upon him to arrest and seize on information. The fallacy of the argument of the appellants' counsel is fully exposed by the reflection that if the Act of 1874 had repealed the Act of 1870, without other provisions, the whole force would have been annihilated, and if the Act of 1874 were repealed, now the Force could look to no other law to avoid a similar fate.

If then the law of 1874 must be looked to, and that law confers no powers upon the force to seize property can it be found elsewhere? The appellants' counsel seems to think that if Willing had the power to arrest the person, he had a right to seize the property. But it is submitted no such deduction can be drawn, either in favor of this special officer, under the laws creating him, nor under the powers incident to the duties of a policeman or other

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Willing and Mezick vs. Bozman.

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peace officer. Nor can he be invested with extraordinary powers, because of an alleged inconvenience in ascertaining the name of the offender. Such difficulties are encountered by all persons employed in detecting and bringing to punishment offenders. If Willing was not invested *ex officio* under the law with power to seize property, for the purpose of securing the offender, no difficulty of his position can confer it upon him.

2nd. But it is said the Local Act of 1872 is not repealed by the Act of 1874. Appellants' counsel urge that the inconsistency of the Acts of 1872 and 1870, was as great as that between the Acts of 1872 and 1874. For the sake of argument, conceding this, how would the matter then stand? It is conceded by appellants' counsel that the Act of 1872 repealed the act of 1870, as far as they are repugnant to each other. Now if the Act of 1874 covers every provision of 1872, and is repugnant thereto, by the same course of reasoning, the latter Act would be repealed. It is also conceded in argument that the Act of 1874 was intended as a revision of the Act of 1870; it is claimed that the same reasoning which establishes this, clearly demonstrates that all the oyster laws relating to the Chesapeake bay, and its tributaries, were also intended to be revised to this extent; that the provisions of the Act of 1874 should be of uniform application.

Finally, if Willing had no authority to seize the vessel, Mezick had none to receive and detain. If this be so, the latter acted extra-judicially, without even a *prima facie* jurisdiction, and if this were done maliciously, as the *narr.* charges, he is liable in damages. *Morgan vs. Hughes*, 2 T. R., 231; *Broget vs. Coyney*, 1 M. & Ry., 215.

In *Edwards vs. Ferris*, 7 C. & P., 542, PATTERSON, J., said: "It is his duty to examine into a charge, or, if there is a reason why he cannot examine into it, he is not to interfere at all." *Davis vs. Capper*, 10 B. & C., 28.

In *Adkins vs. Brewer*, 3 Cow., 206, it was held an action will lie against a Justice of the Peace who, acting without

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Willing and Mezick vs. Bozman.

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jurisdiction, injures another in person or property. *Bigelow vs. Stearns*, 19 *Johnson*, (N. Y.,) 39; *Revell vs. Pettit*, 3 *Met.*, (Ky.,) 314; *Piper vs. Pearson*, 2 *Gray*, (Mass.,) 120; *Blood vs. Sayre*, 17 *Vt.*, 609; *Butler vs. Potter*, 17 *Johnson*, (N. Y.,) 145.

In this State the decisions are no less positive. In *Brevord vs. Hoffman*, 18 *Md.*, 484, this Court uses the following language: "Where the act in question is that of a judicial officer, all that the law can secure is a guarantee that they shall not with impunity do wrong wilfully, fraudulently or corruptly. If they do so act, they are liable both civilly and criminally." And the decision was affirmed in *Hess vs. State*, 24 *Md.*, 562; *Day and Gorsuch vs. Day*, 4 *Md.*, 270; *Deal vs. Harris*, 8 *Md.*, 40.

In all these cases, this distinction is made, viz., where the justice has no jurisdiction and undertakes to act, his acts are *coram non judice*; but if he has jurisdiction and errs in exercising it, then the act is not void but voidable. In the first case he is liable in trespass, otherwise not, unless he acts corruptly. *Beaurain vs. Scott*, 3 *Campbell*, 388; *Ackerly vs. Parkinson*, 3 *M. & S.*, 425; *Allen vs. Gray*, 11 *Conn.*, 95; *Addison on Torts*, ch. 15, sec. 1; *Cooley on Torts*, 419.

No presumption can be made in favor of a justice of the peace, so far as his jurisdiction in civil matters is concerned. At common law, he was simply a conservator of the peace, and his powers and duties in civil matters are conferred entirely by statute. (2 *Hilliard on Torts*, p. 170, note a.) His (a justice's) powers being conferred by statute, his jurisdiction is limited, and if he exceeds it, he becomes a trespasser, and every tribunal of limited jurisdiction acts at its peril. 2 *Hilliard on Torts*, 173; *Piper vs. Pearsons*, 2 *Gray*, 120, 410; *Knowles vs. Davis*, 2 *Allen*, 61; *State vs. Hartwell*, 35 *Maine*, 129; *Lane vs. Crosby*, 42 *Maine*, 327; *Willey vs. Strickland*, 8 *Ind.*, 453; *Clarke & Whipple vs. May & Kent*, 2 *Gray*, 410; *Plummer vs. McLean*, 8 *Ind.*, 457.

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Willing and Mezick vs. Bozman.

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ROBINSON, J., delivered the opinion of the Court.

The declaration in this case contains three counts.

The first charges the defendants with having *unlawfully, wickedly and maliciously* seized and taken possession of the plaintiff's boat, whereby he was greatly damaged and injured.

To this count the defendants pleaded the general issue, and then filed separate pleas by way of justification to the whole declaration.

The separate plea of the defendant, Willing, alleges that the boat mentioned in the declaration was being used for the purpose of dredging oysters in the waters of Wicomico County, and that on being pursued the person in charge of said boat escaped and the boat itself was taken by the defendant, as Deputy Commander of the State Fishery Force, and delivered to one Affra D. Mezick, justice of the peace of said county, to be disposed of according to law.

The separate plea of the defendant, Mezick, alleges that the boat was delivered to him as a justice of the peace, of Wicomico County, by the defendant, Willing, acting as Deputy Commander of the State Fishery Force, charged with violating the provisions of the Act of 1872, ch. 241; and that as justice of the peace he held the same upon said charge to await the adjudication of the questions of law, arising in connection with the condemnation of said boat.

To these pleas the plaintiff demurred, and the question is, whether the defendants, under the facts set forth in these pleas, were justified in taking the plaintiff's boat?

The Act of 1872, ch. 241, prohibits the catching of oysters in the waters of Wicomico County, with scoop, scrape, drag or dredge, and provides that the boat or boats used by persons in violating the provisions of the Act, shall be seized and taken possession of to be disposed of as therein directed.

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Willing and Mezick vs. Bozman.

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Conceding now for the purposes of this case, that the defendant, Willing, as Deputy Commander was authorized by this Act to seize the plaintiff's boat, on the charge of being used in violating the provisions of the statute, the question then is whether the Act of 1872, ch. 241, has been repealed by the Act of 1874, ch. 181?

There is no reference either in the preamble or in the body of the Act of 1874 to the Act of 1872, and the question whether it operates as a repeal of the latter, depends upon whether the provisions of the general Act of 1874 are inconsistent with and repugnant to the provisions of the special Act of 1872. *State vs. Northern Central Railway Company*, 44 Md., 131.

Now by the Act of 1874, the entire oyster law of this State was revised and remodeled. It appropriated twenty thousand dollars for the construction and equipment of six boats, divided the waters of the State into six districts, and provided that a boat should be stationed in the waters of each district, to prevent the violation of the provisions of the Act. One of these districts embraced the waters of *Dorchester* and *Wicomico Counties*. It created a Board to be styled the "State Fishery Force," and authorized said Board to appoint Commanders for each boat. It no longer permitted the seizure and condemnation of boats used in violating the law; but changed the kind and nature of the punishment and the tribunal to enforce it; and there is not a word in the Act to show it was not intended to be of uniform application everywhere except as to *Worcester County*. Then again the provisions of the Act of 1874, in regard to the time allowed for catching oysters and the persons to whom they may be sold, are inconsistent with sec. 2, of the Act of 1872.

The two Acts cannot stand together, and the general Act of 1874 must therefore be construed as repealing the special Act of 1872. The defendant had no right to take possession of the plaintiff's boat, although it was used

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Willing and Mezick vs. Bozman.

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in violating the provisions of that Act. The facts set forth in the special plea did not therefore amount to a justification, and the Court was right in sustaining the plaintiff's demurrer.

We are of opinion also, that the special plea of the defendant Mezick is a bad plea. No rule of pleading is better settled, than that a plea in bar must answer the whole declaration. If the plea undertakes to answer the whole, but in fact answers a part only, the plea is bad, and the plaintiff may demur. *Com. Dig. Pleader, E.*, 1, 36; *Coke Littleton*, 303 a; 1 *Saun.*, 28, note 3; *Steph. on Plead.*, (5th Ed.) 246; 1 *Tyr. & Gran.*, 85; *Karthauss vs. Owings*, 2 *G. & J.*, 430; *Consolidation Coal Co. vs. Shannon*, 34 *Md.*, 144.

And it is equally well settled that every plea is to be understood as confessing such traversable matters alleged on the other side, as it does not traverse. *Bac. Abr. Pleas*, 322, 386, (5th Ed.); *Com. Dig. Pleader*, (G. 2); *Hudson vs. Jones*, 1 *Salk.*, 91; *Nicholson vs. Simpson*, *Fort.*, 356.

Now the declaration charges the defendants with having *unlawfully, wickedly and maliciously* taken the plaintiff's boat, &c. The defendant Mezick undertakes to justify the taking as thus alleged, by saying that the boat was delivered to him as a justice of the peace, by the defendant Willing acting as Deputy Commander, &c., charged with violating the provisions of the Act of 1872, ch. 241, and that as justice of the peace he held the same, &c. To make this a good and sufficient plea, it ought to conclude by denying that the defendant "unlawfully, wickedly and maliciously took the plaintiff's boat." These facts are alleged in the declaration, and should have been expressly and not *inferentially* or *argumentatively* denied. But it is further argued that the demurrer mounts up to the first error in pleading, and if the *narr.* was defective, the Court should have entered judgment for the defendants. It is true, the Court on demurrer will consider the whole record, and give judgment for the party, who, on the whole ap-

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Willing and Mezick *vs.* Bozman.

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pears entitled to it. *Com. Dig. Pleader, M, 1*; 5 *Coke Rep.*, 29 *a*; 1 *Saunders*, 285 *n*; *Le Bret vs. Pophillon*, 4 *East*, 502.

It is insisted that the declaration is bad because it charges the defendants with a joint and separate trespass. This, of course, the plaintiff could not do,

The first and second counts charge the defendants with a joint trespass, and the third charges "*the defendant.*" Whether this be a mere slip of the pen and "*defendant*" was written for "*defendants,*" is quite immaterial, because it does not designate which of the defendants committed the trespass. As a count, therefore, charging a separate trespass it would be bad. But on a general demurrer, the defendants would not be entitled to judgment unless all the counts were defective. In this declaration the first and second counts are good counts, and conceding the third to be bad, yet the other counts were sufficient to support the action.

In any aspect, therefore, in which this case may be viewed, the judgment below must be affirmed.

*Judgment affirmed.*

(Decided 19th June, 1879.)



JOHN G. HARRYMAN and EDSON M. M. SCHRYVER,  
trading as HARRYMAN & SCHRYVER vs. ALBERT D.  
ROBERTS.

*Plea of prior Judgment—Insufficient answer to a Plea of prior Judgment—Service of Personal process on Defendant not essential to the validity of a Judgment against him—Right of each State to prescribe the mode of Service of Process upon its Citizens—Admissibility in Evidence of a Printed volume purporting to contain the Statutes of a State—Art. 37, sec. 47 of the Code—Certificate of Clerk sufficient without the Signature of his full Christian name—What is necessary to make a Judgment in a Prior suit between the same parties a Bar to a second Suit—Admission by a Partner.*

A judgment recovered against a defendant in another State, is a bar to a suit brought upon the same cause of action in this State; and when it is relied on as a plea in bar, the only question open for inquiry is whether the Court in which the judgment was rendered had jurisdiction of the person or subject-matter. The judgment is conclusive as to the merits of the controversy.

Where a suit is brought in this State on the same cause of action on which judgment has been recovered in another State, and such judgment is pleaded in bar to a recovery in the second suit, it is no sufficient answer to such plea, to allege that a motion was filed by the defendant in the Court in which the judgment was rendered to set the same aside on the ground that he was not indebted to the plaintiffs, and that he had not been served with process; and that for the purpose of pleading the said judgment in bar in the second suit, the defendant fraudulently consented to have the said motion overruled.

While it is essential to the validity of a judgment that the defendant should have notice of some kind, it is not always necessary that he should be served with personal process.

Each State has the right to prescribe by law how its citizens shall be brought into its Courts; and if process be served upon a defendant

Harryman and Schryver vs. Roberts.

according to the laws of the State of which he is a resident, and judgment be afterward rendered against him, such judgment is as binding between the parties in this State when relied on as a bar to the prosecution of a second suit upon the same cause of action, as it is in the State where it was rendered.

A book in two volumes published in 1860, entitled "The Revised Statutes of the State of Ohio" of a general nature, in force August 1st, 1860, and upon the title page of which appeared the following words in printing: "Published for the State of Ohio and distributed to its officers under the Act of the General Assembly, passed March 16th, 1860," is strictly within the meaning of sec. 47 of Article 37 of the Maryland Code which provides "that public or private statutes of any State may be read in evidence from any printed volume purporting to contain the statutes of the said State," and is therefore admissible in evidence to show the statute law of the State of Ohio.

It is not essential to the sufficiency of a certificate given by the Clerk of a Court, that he should sign his full Christian name thereto. The signature of "E. W. Pearson, clerk of the Court of Common Pleas of Ross County, Ohio," is sufficient.

In order to make a judgment in a prior suit between the same parties a bar to a second suit, it is only necessary to prove that the subject-matter of the two suits is substantially the same. The fact that the forms of action in the two cases are different, does not affect the question, provided the matter in controversy be the same.

An admission by a partner relative to a matter of partnership concern, binds his co-partner.

### APPEAL from the Court of Common Pleas.

Henry Wagner and Edson M. Schryver as co-partners, carrying on business in Baltimore city, under the firm name of Wagner & Schryver, made advances on consignments of broom corn to Albert D. Roberts, of Ohio, the appellee. The advances exceeded the consignments some \$2800. Wagner died and Schryver went into partnership with John G. Harryman, under the name of Harryman & Schryver. Schryver, as surviving partner of Wagner & Schryver, assigned, in writing, the claim against Roberts to Harryman & Schryver, who, on the 18th of March, 1878,

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Harryman and Schryver vs. Roberts.

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instituted an attachment against Roberts, and caused the writ to be laid in the hands of various parties as garnishees. The case is further stated in the opinion of the Court.

The Court below sustained the defendant's demurrer, and the plaintiffs then joined issue short on his third plea. An agreement of counsel was filed waiving all errors in pleading.

*Plaintiffs' First Exception.*—This was taken to the action of the Court (BROWN, J.) in sustaining the defendant's demurrer.

*Plaintiffs' Second Exception.*—This was taken to the admission in evidence of certain matters read from a printed book, in two volumes, purporting to be "The Revised Statutes of the State of Ohio," of a general nature in force August 1st, 1860, &c.

*Plaintiffs' Third Exception.*—This was taken to the reading in evidence the transcript of the record of the case of *Harryman & Schryver vs. Roberts*, in the Court of Common Pleas of Ross County, Ohio.

*Plaintiffs' Fourth Exception.*—The plaintiffs offered two prayers, as follows:

1. If the jury find from the evidence, that at the time suit was instituted in Ohio by the plaintiffs against the defendant, the plaintiff, Schryver, had not assigned in writing the causes of action, mentioned in evidence, to himself and the plaintiff, Harryman, then the jury are not at liberty to find from the evidence that the causes of action mentioned in this suit, are the same as the causes of action on which the plaintiffs sued the defendant in Ohio.

2. The jury are instructed that the admission of one of the plaintiffs that the causes of action in this suit, and in that mentioned in the alleged judgment offered in evidence, are the same, is not binding on the plaintiff, Harryman.

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Harryman and Schryver vs. Roberts.

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The defendant offered the following prayer:

If the jury find from the evidence in the case, that the defendant, Albert D. Roberts, was a resident of Ross County, in the State of Ohio, on the 22nd day of January, 1878, at the time of the institution by the plaintiffs against him of the suit in Ross County, Ohio, of which suit a record has been offered in evidence in the case now on trial; and shall further find that the indebtedness, for the recovery of which the suit in Ohio was instituted, is virtually and substantially the same as the indebtedness for the recovery of which the case now on trial was instituted, *then* their verdict must be for the defendant, notwithstanding the fact that in the Ohio case the debt was sued for as due upon an account stated between Harryman & Schryver and Albert D. Roberts, and in the case now on trial, the debt is sued for as a debt having been due by Roberts to Wagner & Schryver, and by said Schryver, as the survivor of said firm of Wagner & Schryver, assigned to said Harryman & Schryver.

The Court rejected the prayers of the plaintiffs and granted the prayer of the defendant. The plaintiffs excepted, and the verdict and judgment being against them, they appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Sebastian Brown*, for the appellants.

The alleged judgment in Ohio is no bar to this action, because the defendant fraudulently consented that it be allowed to stand against him for the sole purpose of pleading the same in bar of this suit, and of defrauding the plaintiffs out of their money.

Where the Statute of Limitations is pleaded, a replication alleging fraud is a sufficient answer to the plea. *Baltimore Building Association, No. 2, of Baltimore City vs. Grant*, 41 Md., 560.

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Harryman and Schryver vs. Roberts.

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The defendant, by his affidavit, as alleged in the second replication, swore he was not served with process, and as appears from the transcript of said judgment, he was not served with process. Such being the fact alleged by the replication, the Court in considering the demurrer could not look to the statute laws of Ohio for evidence to support the demurrer. *Ritchie's Case*, 31 Md., 191.

If the defendant were not served with process, the judgment against him as far as this State is concerned, is simply void.

The Court erred in permitting the defendant to read in evidence certain printed matter from two volumes, purporting to be the Revised Statutes of Ohio, of a general nature. The object of this evidence was to prove that according to the laws of Ohio, a writ of summons in a suit could be legally served by leaving the same in the usual place of residence of the defendant.

Article 37, sec. 47, of the Maryland Code, provides that "public or private statutes \* \* \* of any State \* \* \* may be read in evidence from any printed volume purporting to contain the statutes of the said \* \* \* State."

These two volumes do not profess to contain all the statutes, or the particular statutes of any one session, but only statutes of a general nature. The books on their face have the appearance of being a private codification, and they contain no internal evidence of having been published by authority. Though they contain the words "published for the State of Ohio," by an Act passed March 16, 1860, the Act does not appear in the volumes.

The volumes contemplated by Article 37, sec. 47, of our Code, are such as contain the statutes of a particular session of the Legislature, or a codification of the laws which has been adopted by the Legislature.

The alleged judgment has no binding force in this Court, because the defendant was not personally served with process. *D'Arcey vs. Ketchum*, 11 How., 174; *Webster vs.*

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Harryman and Schryver vs. Roberts.

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*Reid*, 11 *How.*, 459, 460; *Nations vs. Johnson*. 24 *How.*, 195; *Weaver vs. Boggs*, 38 *Md.* 261; *Mayhew vs. Thatcher*, 6 *Wheaton*, 129; *Lincoln vs. Sower*, 2 *McLean*, 473; *Westerwelt vs. Lewis & Sooker*, 2 *McLean*, 511.

It is claimed that a judgment where there has been no personal service is good, if the defendant be a resident of the State where judgment is rendered, and the law of that State makes other process sufficient.

The Court said in *Webster vs. Reid*, that a judgment recovered without personal service is a nullity whether the defendant be a resident or not.

This Court held in *Weaver vs. Boggs*, that whether a foreign judgment recovered without personal service is binding or not, must be determined by the circumstances of each case as it arises. If there ever was a case where the judgment should be held not binding, this is that one.

The transcript is not properly certified.

The prayers of the plaintiffs should have been granted and the prayer of the defendant rejected. The only evidence that the cause of action in both suits is the same, is in an admission of one of the plaintiffs, as testified to by Mr. Schmucker.

Parol testimony as laid down in *Whitehurst vs. Rogers*, 38 *Md.*, 517, 518, is often necessary to show that causes of action are the same. But this must be taken with certain limitations. If suit be brought to recover for goods bargained and sold, and after judgment a second suit be brought for goods bargained and sold, it is proper to show that the goods mentioned are the same in both cases. But if the second suit be brought for money lent, then, even if the previous case for goods bargained and sold went by default, it would be incompetent to show that the suit for goods sold and the suit for money lent were on the same cause of action.

The suit in Ohio was on an account stated, and the suit here is on money paid for, and for money lent to, the de-

Harryman and Schryver vs. Roberts.

fendant by Wagner and Schryver, as well as on accounts stated. In this case we claim nothing on the count of accounts stated. How then can the cases be the same? A judgment by default was recovered when the defendant owed nothing. He knew he owed nothing and could have caused the judgment to be stricken out. He must take the consequences of that judgment as of any other judgment by default. The admission of Schryver might bind him if he were sole plaintiff, but it being an admission beyond the scope of his authority as a partner, it cannot bind the firm.

*Samuel D. Schmucker*, for the appellee.

The Court below was right in sustaining the demurrer to the first, second and fourth replications to the defendant's third plea, because the first replication tendered no issue of fact, but attempted to put in issue, to be tried by a jury, mere matters of law.

The second replication is bad, because it is vague, argumentative and uncertain, and also, because it relies upon the pendency of a proceeding, *i. e.* a motion to strike out the judgment instituted subsequent to final judgment.

The Ohio judgment would have been a good bar to the present suit, even if an appeal were now pending from that judgment. *Bank of North America vs. Wheeler*, 28 Conn., 433.

The second replication is also bad, because it attempts to put in issue the propriety of the action of the Ohio Judge in overruling the motion to strike out the judgment rendered there—a matter which it was not competent for the Court below to review.

The fourth replication is bad, because the defendant was under no obligation to keep the plaintiffs advised in the law of their case, either in Ohio or here.

The appellants, by entering into the agreement at the trial to waive all errors in pleading, acquiesced in the

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Harryman and Schryver vs. Roberts.

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action of the Court in sustaining the demurrer to the replications.

The appellee was plainly entitled to read in evidence the portions of the statute law of Ohio offered in evidence by him from the edition of "the Revised Statutes of Ohio" used at the trial below. The Code, article 37, section 47, provides that the statutes of any State may be read in evidence from *any printed volume purporting to contain the statutes of such State*. The volume of Ohio statutes used at the trial below clearly comes within the requirements of the Code, for upon its very title page appear the words: "Published for the State of Ohio, and distributed to its officers under the Act of the General Assembly, passed March 16, 1860."

The objections offered by the appellants in the Court below to the admission in evidence of the transcript of the record of the Ohio judgment, and set forth in the third bill of exceptions, were not tenable. There can be no question that the Ohio judgment, if founded upon the same cause of action as that relied upon by the appellants as the foundation of the present suit, would have merged that cause of action, and would form a complete bar to the present suit. *Bank of U. S. vs. Merchants' Bank*, 7 Gill, 415; *Whitehurst vs. Rogers*, 38 Md., 503-514, 515.

It does not appear from the Ohio record that the defendant was personally served with process in the case in which the judgment was rendered against him in that State; but it does appear from the transcript of that record, and the evidence in the case below, that the process in the Ohio case was left at the residence of the defendant, *in accordance with the method prescribed by the laws of Ohio for the service of summons in such cases*, and that the defendant was, at the time of the institution of that suit, and had, for many years prior thereto, been, a resident of the State of Ohio.



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Harryman and Schryver vs. Roberts.

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It is well settled that a judgment *against a citizen of the State where rendered*, even without personal service of process, if the defendant be summoned according to the laws of that State, merges the cause of action, and is valid and conclusive everywhere, and will sustain an action in another State upon the record, or will form a bar to a new suit upon the original cause of action. *Freeman on Judgments*, sec. 221; *Henderson vs. Standiford*, 105 *Mass.*, 504-6, *Beisenthal vs. Williams*, 1 *Duv.*, (Ky.) 329, 331; *Black vs. Black*, 4 *Bradf.*, 174, 208-9; *Fullerton vs. Horton*, 11 *Vermont*, 425-427; *Buford vs. Pugh*, 13 *Arkansas*, 33, 35; *Weaver vs. Boggs*, 38 *Md.*, 260.

The transcript of the Ohio record was a full and complete copy of the entire proceedings in the case up to final judgment.

If the Court here be satisfied that the Ohio Court rendering the judgment in question had jurisdiction over the defendant personally, in accordance with the laws of Ohio, then it was not competent for the Court below to inquire into the regularity of the proceedings in the Ohio Court intervening between service of process and rendition of judgment; but further, if the successive steps of the case in Ohio are inquirable into, then the record shows that all of those steps were taken according to the laws of Ohio. *State, use of Bruner vs. Ramsburg*, 43 *Md.*, 334-5; *Anderson vs. Fry*, 6 *Ind.*, 76.

The record of the Ohio judgment was properly certified, both under the Revised Statutes of the United States, ch. 17, sec. 905, and under the provisions of the Code, Art. 37, sec. 35. The fact that the clerk did not sign his full Christian name to the certificate was not material. In the case of *Knapp vs. Abell*, 10 *Allen Rep.*, the signature of the clerk to the certificate was "M. Chamberlain, Clerk;" and in the case of *Harper vs. Nichol*, 13 *Texas*, 152, the clerk signed "Wm. T. Avery, Clerk;" and in both cases the record was held to have been properly certified.

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Harryman and Schryver *vs.* Roberts.

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The certificate of the Judge to the transcript, following that of the clerk, that the attestation of the clerk *is in due form and by the proper officer*, is conclusive as to the regularity of the clerk's signature. *Freeman on Judgments*, sec. 412; *Regan vs. McCormick*, 4 Harr., (Del.) 435; *Grover vs. Grover*, 30 Mo., 400, 403; *Ferguson vs. Harwood*, 7 Cranch, 408.

The appellants' first prayer was properly rejected by the Court below, because it is at variance with the doctrine plainly laid down by the Court of Appeals in numerous cases, in which it is declared that to make a judgment in a prior suit between the same parties a bar to a second suit, it is only necessary that the cause of action in the two suits should be *virtually* and *substantially* the same; and this virtual identity of the cause of action in the two suits need not appear of record, but may be established by parol testimony, either under the *general issue*, or a special plea setting up the prior judgment as a bar. The form of action in the two causes need not be the same; it is sufficient if the subject-matter of the suits be substantially the same. *Whitehurst vs. Rogers*, 38 Md., 503, 514, 515; *State, use of Bruner vs. Ramsburg*, 43 Md., 325, 334.

The second prayer of the appellants was properly rejected by the Court below, because it was shown that at the institution of the suit, and at the time of the making of the admission by Schryver to the appellee's attorney as to the identity of the causes of action in the two suits, the appellants were co-partners, and that they continued to be such up to the time of the trial below. It was a plain case of an admission of a member of an existing firm relative to a matter of partnership concern. 1 *Greenleaf on Evidence*, secs. 172, 174, 177; *Doremus vs. McCormick*, 7 Gill, 63.

The prayer of the appellee which was granted by the Court below, correctly states the law of the case in accordance with the principles laid down by the Court of Appeals

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Harryman and Schryver vs. Roberts.

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in the cases of *Whitehurst vs. Rogers*, 38 *Md.*, 514, 515; and *State, use of Bruner vs. Ramsburg*, 43 *Md.*, 325, 334.

ROBINSON, J., delivered the opinion of the Court.

The appellants instituted a *non-resident attachment* suit against the appellee, and caused the writ to be laid in the hands of sundry persons as garnishees, against whom suits were docketed in the usual form.

The appellee, defendant below, appeared to the short note case, and pleaded

1st. Not indebted as alleged.

2nd. That he did not promise as alleged.

3rd. That prior to the institution of this suit, the plaintiffs had recovered a judgment against the defendant, for the same cause of action in the Court of Common Pleas, for the County of Ross, in the State of Ohio.

The plaintiffs joined issue on the first and second pleas, and filed four replications to the third plea.

The defendant joined issued on the third replication, and demurred to the first, second and fourth replications.

In these replications the plaintiffs allege that the judgment relied on in the defendant's pleas, is invalid, because a motion was filed by the defendant to set it aside, on the ground that he was not indebted to the plaintiffs, and also because he had not been served with process; and that for the purpose of pleading the alleged judgment in bar in this suit, the defendant fraudulently consented to have the said motion overruled.

The question then presented by the demurrer, is, whether these facts are a sufficient answer to the defendant's pleas?

Now it is well settled that a judgment recovered against a defendant in another State, is a bar to a suit brought upon the same cause of action in this State. *Bank of U. S. vs. Merchants' Bank*, 7 *Gill*, 415; *Whitehurst vs. Rogers*, 38 *Md.*, 503-515; 2 *American Leading Cases*, 617.

And when it is relied on as a plea in bar, the only question open for inquiry is, whether the Court in which the judgment was rendered had jurisdiction of the person or subject-matter. See cases collated in 2 *American Leading Cases*, 617.

The judgment is conclusive as to the merits of the controversy. 2 *Smith's Leading Cases*, 679, 841; 2 *American Leading Cases*, 612.

The fact then, that the defendant filed a motion to set aside the judgment in the Court in which it was rendered, and the grounds on which the motion was based, are quite immaterial so long as the judgment stands between the parties. If the plaintiffs had a judgment against the defendant in Ohio, for the same cause of action which they are prosecuting here, they certainly have no reason to complain, that the defendant agreed to have his motion to strike out the judgment overruled. Be that as it may, the motion in no manner affects the validity of the judgment, and constitutes no sufficient answer to the defendant's plea, and the demurrer was therefore properly sustained.

The next question presented by the record is, whether the judgment offered in evidence is a valid judgment against the defendant?

It does not appear from the face of the judgment that personal process was served upon the defendant, but it does appear that a written notice was left at his place of residence.

It is essential, of course, to the validity of every judgment, that the parties to be bound should have notice of some kind, either *actual* or *constructive*. Every one is entitled to his day in Court, and to the right of being heard before a judgment of any kind is rendered against him. But it is not always necessary that personal process shall be served upon him. Each State has the right to prescribe by law how its citizens shall be brought into its Courts.

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Harryman and Schryver vs. Roberts.

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And whatever conflict there may be in some of the earlier cases on the subject, we think it is now well settled, that if process be served upon the defendant, according to the laws of the State of which he is a *resident*, and judgment be afterwards rendered against him, such a judgment is as binding between the parties, in this State, when relied on as a bar to the prosecution of a second suit, upon the same cause of action, as it is in the State where it was rendered. *Price vs. Hickok*, 39 *Vermont*, 292; *McRae vs. Walton*, 13 *Pick.*, 52; *Pooman vs. Crane*, 1 *Wright*, (Ohio,) 347; *Joiner vs. Hill*, S. C., 439; *Hunt vs. Lyle*, 8 *Yerger*, 142; *Green vs. Sarmiento*, 1 *Pet. C. C.*, 74; *Rangely vs. Webster*, 11 *N. H.*, 299.

If so, the question then is, whether the service of the process in this case was in conformity with the statute law of Ohio? To prove this, the defendant offered to read in evidence as statute laws of that State, from a book in two volumes published in 1860, entitled "The Revised Statutes of the State of Ohio," of a general nature, in force August 1st, 1860, collated by Joseph R. Swan, with notes of the decisions of the Supreme Court by Leander J. Critchfield, and upon the title page of which appeared the following words in printing: "Published for the State of Ohio, and distributed to its officers, under the Act of the General Assembly, passed March 16th, 1860;" to the reading of which the plaintiffs objected.

Article 37, sec. 47, of the Code provides "that public or private statutes of any State may be read in evidence from any printed volume purporting to contain the statutes of the said State." The book from which the defendant proposed to read, not only purports to contain the statutes of Ohio, but upon the title page purports to have been "published for the State of Ohio, and distributed to its officers, under the Act of the General Assembly, passed March 16th, 1860." It is a volume, therefore, strictly within the meaning of the Code, and was therefore admissible in evidence.

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Harryman and Schryver vs. Roberts.

The record of the Ohio judgment was properly certified both under the Revised Statutes of the United States, ch. 17, sec. 905, and under the provisions of the Code, Art. 37, sec. 35. The Clerk of the Court of Common Pleas certifies, under the seal of the Court, that it is a true copy of the record, and the Presiding Judge of said Court certifies to the official character of the Clerk, and the Clerk certifies, under the seal of the Court, to the official character of the Judge. It was not necessary that the Clerk should sign his full Christian name to the certificate. The signature of "E. W. Pearson, Clerk of the Court of Common Pleas of Ross County, Ohio," was sufficient.

There was no error in refusing the plaintiffs' first prayer. In order to make a judgment in a prior suit between the same parties a bar to a second suit, it is only necessary to prove that the subject-matter of the two suits is substantially the same. The fact that the forms of action in the two cases are different, does not affect the question, provided the matter in controversy be the same. *Whitehurst vs. Rogers*, 38 Md., 503; *State, use of Bruner vs. Ramsburg*, 43 Md., 325.

The second prayer was also properly refused. By it, the Court was requested to instruct the jury that the admission of one of the plaintiffs, that the causes of action in this suit and in the Ohio judgment, offered in evidence, are the same, was not binding upon the other plaintiff. The plaintiffs were co-partners, and continued to be up to the trial below, and the admission of one member of the firm relative to a matter of partnership concern was binding upon the other partner. 1 *Greenleaf Ev.*, 172, 174, 177; *Doremus vs. McCormick*, 7 Gill, 63.

It follows from what we have said, that there was no error in granting the defendant's prayer.

The judgment below will, therefore, be affirmed.

*Judgment affirmed.*

(Decided 19th June, 1879.)

JESSE LAZEAR *vs.* THE NATIONAL UNION BANK OF  
MARYLAND, AT BALTIMORE.

*Inadmissibility of Parol evidence to vary a Written contract—  
Statute of Frauds—When Usury does not avoid a Contract  
—National Banks not authorized under the Banking Act to  
purchase Notes—Province of the Jury.*

Parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a written instrument. When parties have entered into a written agreement, it is only reasonable to suppose, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, whether before, or after, or at the time of the completion of the contract, will be rejected.

Where the Statute of Frauds requires a contract to be in writing, to make it valid, it cannot be partly in writing and partly in parol.

An action was instituted by the appellee against the appellant to recover on the following guaranty of the latter, executed on the 3rd of February, 1870. "For value received, I hereby guarantee to the National Union Bank of Maryland, at Baltimore, all liabilities to said bank, of Lazear Brothers, now existing, or which may hereafter arise, to the extent of twenty-five thousand dollars, I hereby holding myself liable to said bank to that extent for all paper that may be held by the bank, of Lazear Brothers, either as drawers or endorsers, in the same manner as if endorsed by me, I hereby waiving notice of protest of such paper." The defendant offered parol evidence for the purpose of raising and explaining a latent ambiguity in the guaranty—that there was more than one class of paper held by the Bank, to which the contract of guaranty might be applied, and contended, that the evidence was admissible to show, that the parties intended it to apply to, and cover only such paper as should be discounted by the bank *for the benefit* of Lazear Brothers. **HELD:**

That there was no obscurity or ambiguity in the language employed, nor any uncertainty as to the subject-matter upon which the contract was intended to operate; that to the extent of twenty-five thousand dollars it covered *all* paper that might be held by the

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**Lazear vs. Natl. Union Bank of Md.**

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Bank, upon which Lazear Brothers were either drawers or endorsers; and that the evidence offered, which could have had no other effect than to limit and restrict the terms of the guaranty, and to show that the language used in it did not mean what it clearly and plainly expressed, was inadmissible.

The demand and receipt by a National Bank of usurious interest from endorsers upon notes discounted by it, the payment of which notes was guaranteed to the bank by L. in a written guaranty, does not avoid the contract of guaranty between L. and the Bank.

A National Bank has no authority under the Banking Act to use its funds in purchasing notes, and can acquire no title thereto by the purchase.

Where a guaranty is given to a National Bank for all liabilities to said bank of certain parties, then existing or which might thereafter arise, to the extent of an amount specified, the guarantor holding himself liable to that extent for all paper that might be held by the Bank of said parties, either as drawers or endorsers, and the Bank subsequently discounts paper, of which said parties were drawers or endorsers, it is exclusively within the province of the jury in an action by the Bank against the guarantor, to determine whether the money was parted with by the Bank on the faith of the guaranty or otherwise.

**APPEAL from the Superior Court of Baltimore City.**

Lazear Brothers, who had been for some years engaged in the wholesale grocery business, keeping their commercial account in the Western National Bank of Baltimore, in 1868, at the invitation of Mr. William W. Spence, a director in the National Union Bank of Maryland, transferred their account to the latter bank. Becoming its depositors or customers, they frequently offered for discount to the appellee country paper, mostly of their Western country customers, which was unknown to the Bank; they also offered notes, to a limited extent, drawn by their father, the appellant, to their order and by them endorsed.

This action was instituted by the appellee to recover of the appellant on the following guaranty:

“For value received, I hereby guarantee to the National Union Bank of Maryland, at Baltimore, all liabilities to



Lazear vs. Natl. Union Bank of Md.

said bank of Lazear Bros., now existing, or which may hereafter arise, to the extent of twenty-five thousand dollars, I hereby holding myself liable to said bank to that extent, for all paper that may be held by the bank of Lazear Bros., either as drawers or endorsers, in the same manner as if endorsed by me, I hereby waiving notice of protest of such paper."

(Signed,)

"JESSE LAZEAR."

At the trial of the cause, the appellee offered in evidence the foregoing guaranty, which was conceded to have been executed on the 3rd of February, 1870, and proved the genuineness of the appellant's signature thereto. The appellee also offered in evidence seven promissory notes, of which it was the holder, all drawn by Lazear Brothers, to their own order, and endorsed by themselves, six of which were also endorsed by W. D. Schurtz & Co., who were also customers of the appellee, and for whom the said six notes were discounted, the proceeds being carried through the books of the appellee to the credit and for the benefit of said W. D. Schurtz & Co., by whom these notes were offered for discount. The remaining note, dated the 22nd of June, 1872, at ninety-five days, for \$5000, was *purchased* by the appellee from James Winchester & Son, brokers. The notes were all put in evidence, subject to exception. It was proved by Mr. Taylor, President of the appellee, that these notes were acquired by the appellee on the faith of and looking to the guaranty given by the appellant; and that payments had been received on account of the six notes by collection of a note of August Douglass, obtained as a collateral from Schurtz & Co., and by dividends from the trustee of Schurtz & Co., and that payments had been made on all the notes by dividends received from the assignees in bankruptcy of Lazear Brothers. This action was brought to recover the balance due on these notes. It was in evidence that the six notes referred to, were discounted at the rate of seven and one-

Lazear vs. Natl. Union Bank of Md.

half per centum per annum, by agreement between the parties and the appellee, and the remaining note was bought at the rate of nine per cent. per annum.

*First Exception.*—The appellant, during the cross-examination of Mr. W. W. Taylor, President of the appellee, proposed to him this question: "Tell the jury what was the occasion of this paper (referring to the guaranty offered in evidence) being suggested," but the question was objected to by the appellee, thereupon the appellant, in order to explain his purpose in asking such question, and the proof intended to be elicited thereby, offered the following statement:

"The defendant, for the purpose of showing that the indebtedness of Lazear Brothers to the Bank, as its customers, and for paper drawn or endorsed by them and discounted by the Bank for their account, and not the general indebtedness of Lazear Brothers to the Bank for any paper of theirs which it might buy from outside parties, or discount for others of its customers, was the subject of the guaranty given in evidence. And for the further purpose of enabling the Court to apply the said guaranty to its proper subject by reference to the surrounding facts and circumstances. And for the further purpose of proving the real consideration of the said guaranty between the parties thereto. And also for the purpose of enabling the Court to determine whether or not the said guaranty was a continuing guaranty. And for the purpose of showing a latent ambiguity in said guaranty as to the subject-matter to which it was applicable and of removing said ambiguity, offered to prove:"

"(That the firm of Lazear Brothers were customers of the plaintiff at the date of the guaranty, and had so been for two years or thereabouts prior thereto; that they had been prior to and were at that date in the habit of asking and receiving discounts from the plaintiff on paper of their [Lazear Brothers'] customers, endorsed by themselves, and

*Lazear vs. Natl. Union Bank of Md.*

sometimes by their father, the defendant in this case; that it was often inconvenient to procure the endorsement of defendant, as he was a resident of the county.) And that the said guaranty was requested of the said Lazear Brothers by the plaintiff, and given accordingly by the defendant to the plaintiff, as a substitute for such endorsements in the future, and to prevent the delay and inconvenience of obtaining them, and for the purpose of giving credit to Lazear Brothers in their direct dealings with the plaintiff as its customers, and in respect to paper discounted, or to be discounted by it for their direct benefit and account, and on their application, and not otherwise. And also to show that there was an express agreement and understanding at the time of the delivery of said guaranty that it was only to apply to paper discounted for the use of Lazear Brothers."

But the appellee objected to the admissibility of the proof so offered, and to every part of it except to the introductory part thereof contained within brackets, and the Court (DOBBS, J.) excluded all of the said proof, except the part aforesaid, from the jury; to which ruling of the Court, and the exclusion of the proof from the jury, the appellant excepted.

*Second Exception.*—The appellant, after the plaintiff had closed its case in chief, presented to the Court a statement setting forth the proof intended and offered to be given by William W. Spence, and by the defendant, and by other witnesses in his behalf, as follows:

[ "The defendant offers to prove by William W. Spence, a director of the plaintiff, prior to and at the time of the execution of the guaranty sued upon, and by the defendant, and other witnesses, that the firm of Lazear Brothers were invited by the said Spence to transfer their account from the Western Bank to the National Union Bank, (the plaintiff,) and did so at his invitation; that they were in the habit of offering for discount by said plaintiff a good

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Lazear vs. Natl. Union Bank of Md.

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deal of country paper of such as the Bank by its rules of discounting required, two dollars for one, unless there was a city endorser, besides the customer offering the same;] that at a meeting of the Board, in which the matter was discussed, the said Spence suggested that, in order to protect the Bank, in discounting such paper for Lazear Brothers, and to supersede the necessity of exacting two for one, or an additional city endorser, the Bank should request Lazear Brothers to give it a guaranty from their father, the defendant, of the same sort as the one he had given the Western Bank, to the knowledge of the said Spence, and whereby he should indemnify the Bank to a certain amount for such discounts as the Bank might make for Lazear Brothers; that the Board approved of the suggestion, and authorized Mr. Spence to communicate it to Lazear Brothers, which he did, and they agreed accordingly to procure such a guaranty on such purpose from their father, to the amount of \$25,000; that Mr. Spence reported to the Board his conversation with the Messrs. Lazear and its result, and their promise to procure such a guaranty, which the Board approved and accepted, and requested Mr. Spence to see the Messrs. Lazear Brothers and ask them to see Mr. Mickle, the cashier of the plaintiff, who would prepare such a paper, which Mr. Spence accordingly did; that James Lazear, one of the firm, accordingly saw Mr. Mickle, who gave him the guaranty here offered in evidence, which he took to the defendant, who asked whether it was to the same effect as the guaranty above mentioned, given to the Western Bank, *i. e.*, to guarantee payment of paper discounted by the Bank for Lazear Brothers, to which said James Lazear, in good faith and so believing, answered in the affirmative, whereupon the said defendant, in like good faith and so believing, signed the said guaranty, without reading the same; that said James Lazear took the said guaranty to Mr. Mickle, and delivered it to him,

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*Lazear vs. Natl. Union Bank of Md.*

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saying to him, that it was of course understood between them, that said paper guaranteed nothing but the paper signed by, or endorsed by Lazear Brothers, and discounted by the Bank for them, to which Mr. Mickle replied, "That's all;" and said Lazear delivered the guaranty to him accordingly with that common understanding between them, so expressed and recognized by both, and not otherwise."

"This evidence is offered to show, not merely the subject of the said guaranty, and apply the language of the guaranty to such subject, and for the other purposes named in the defendant's offer of evidence, heretofore made and rejected, but also to show that the guaranty as offered and construed by the plaintiff, was not the contract or guaranty of the defendant, and that the use attempted to be made of it, by the plaintiff in this action, and for the purposes of recovering therein upon or to the extent of the notes offered in evidence, would be a fraud on the defendant."

But the Court on the plaintiff's objection, excluded all proof as to the matters and things contained in the said offer, except the portions included within brackets; to this ruling of the Court, and the exclusion of the proffered proof the defendant excepted.

*Third Exception.*—The appellant further offered in evidence an account furnished to him by the appellee, showing the amount of interest charged to the firm of Lazear Brothers by the appellee from September 13th, 1869, to September 9th, 1872, which was offered for the purpose of proving, in connection with other evidence given or to be given, that the appellee knowingly and unlawfully charged to, and reserved, received and took from Lazear Brothers, a rate of interest greater than that allowed by the law of the State of Maryland, in violation of Revised Statutes of the United States, Title lxii, sections 5197 and 5198. The claim of the appellant and the purpose of said

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Lazear vs. Natl. Union Bank of Md.

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evidence being to establish that the appellant was entitled to have the whole of said interest credited for his benefit, to the said Lazear Brothers, in account between them and the appellee, or to recoup, or set-off the same on their behalf, and for his benefit against the appellee's demand in this action.

But the appellee objected to the admissibility of said offer or any part thereof, and the objection was sustained by the Court. To this ruling and action of the Court the defendant excepted.

*Fourth Exception.*—The appellant further offered to prove by William L. Lazear, in open Court, the matters and things contained in his deposition *de bene esse*, theretofore taken in this case. But the appellee objected to the admissibility of said matters and things in evidence, or any part thereof, and the Court excluded all of such proof from the jury; and to this ruling the appellant excepted.

*Fifth Exception.*—William L. Lazear was then examined, and testified among other things, that after the execution of the guaranty of February 3rd, 1870, he did in one instance offer for discount to the appellee, some paper drawn by his firm, (Lazear Brothers,) but that the same was not discounted, and that no reason was assigned for its being turned down; that the paper generally offered by them for discount was that of customers residing in Pittsburg, and other large cities out of Maryland; that in discounting their paper, the Bank requested his firm through one of its agents, to give an endorsement on out of town paper, shortly after their account was opened, probably in January, 1870.

The witness was then asked "whether the Bank, (the appellee,) required from him anything else as a security, except endorsement upon country paper," to which question, he replied, "the same messenger, the same agent of the bank asked for a guaranty in lieu of such endorsement;" thereupon the appellee objected to all of said

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*Lazear vs. Natl. Union Bank of Md.*

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answer, except "that the Bank asked for a guaranty," and the Court excluded the other part of said answer, *i. e.* "in lieu of an endorsement," and the appellant excepted to such exclusion.

*Sixth Exception.*—After further proof, and the testimony on both sides being closed, the defendant filed a formal motion for the exclusion of the several promissory notes which had been offered in evidence subject to exception; this motion the Court refused. The plaintiff offered the following prayer:

If the jury find from the evidence, that the guaranty offered in evidence by the plaintiff, dated Feb. 3rd, 1870, was executed by the defendant and accepted by the plaintiff, and that the seven promissory notes offered in evidence were executed by Lazear Brothers, as drawers, and were discounted by the plaintiff, as shown by the evidence, and have been held by the plaintiff ever since, and that they were so discounted by the plaintiff, looking to the said guaranty, and on the faith thereof, and that said Lazear Brothers made default in the payment of said notes, and that they still remain unpaid, except to the extent of the payments offered in evidence, then the plaintiff is entitled to recover the amount of said notes with interest, less the payments thereon, as offered in evidence; unless the jury shall find that the note for \$5000, offered in evidence, was in fact discounted by the plaintiff for the use and benefit of Lazear Brothers, at a rate of interest greater than six per cent., in which case the jury will (also deduct from the amount of said note, in addition to the credits above mentioned, the amount of interest reserved by the plaintiff in making said discount.)

And the defendant, should the Court decline to exclude from the consideration of the jury the promissory notes given in evidence by the plaintiff, subject to exception, prayed the Court to instruct the jury as follows:

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*Lazear vs. Natl. Union Bank of Md.*

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1. That if they shall believe from the whole evidence in the cause, that the guaranty of the defendant, construed in the light of the circumstances under which it was demanded and executed, and which have been given in evidence, applies only to liabilities of Lazear Brothers, contracted by them as customers of the Bank, and in their own dealings with it as such customers, and not to paper discounted for or purchased from other persons by the Bank, then the verdict of the jury must be for the defendant.

1½. That if the jury shall find from the relative position, and the relations of the Bank and its customers, Lazear Brothers, at the time of the execution of the guaranty in controversy, and from all the circumstances surrounding the transaction, as given in evidence, that the said guaranty was intended by and between the parties thereto, to apply only to the liabilities which had been or might thereafter be incurred by Lazear Brothers to the Bank, in the dealings between it and them as Bank and customers, and shall further find that the promissory notes produced in evidence by plaintiffs, became the property of the Bank in the manner and under the circumstances testified to by the witnesses, Messrs. Taylor and Winchester, then the defendant is not liable for said notes under his said guaranty, and the verdict of the jury must be for defendant.

2. If the jury shall find from the whole evidence that the guaranty of defendant was demanded and given for the purpose of securing the Bank against loss, upon usurious transactions had or to be had between the Bank and Lazear Bros., then the said guaranty was void, and the plaintiff cannot recover thereupon in this action.

3. If, however the jury shall find from the whole evidence that the said guaranty was not demanded or given, or intended between the parties thereto, to secure the Bank against loss upon usurious transactions between it



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*Lazear vs. Natl. Union Bank of Md.*

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and Lazear Brothers, their verdict must still be for the defendant, it being admitted that the notes offered in evidence by the plaintiff were knowingly discounted or acquired by the plaintiff at usurious rates.

4. If the jury shall hold that the construction of the defendant's guaranty, under and in view of all the evidence in the cause, is for the Court, and shall reject the prayers of defendant, marked respectively, "1 and 1½," the defendant prays the Court to instruct the jury, that in view of the whole evidence in the cause, the said guaranty applies only to such liabilities of Lazear Brothers, as had been or might be incurred by them as customers of the Bank, and in dealings between it and them as Bank and customers; and if the jury shall find that the liability of Lazear Brothers, upon the promissory notes given in evidence, was not incurred by them as such customers and in such dealings, the plaintiff is not entitled to recover.

5. And the defendant further prays the Court, so construing said guaranty, to determine, as matter of law, that the said guaranty properly construed, does not apply to usurious transactions between the plaintiff and Lazear Brothers, and it being admitted by the plaintiff that the plaintiff discounted all the notes in evidence at usurious rates, defendant prays the Court to instruct the jury to find for the defendant.

5½. That there is no evidence in the cause, that at the time of the execution and delivery of the guaranty in suit, the defendant was notified or knew that usurious transactions of any sort were in contemplation of the plaintiff under said guaranty, or that the defendant was ever thereafter notified or knew that any transactions were had or contemplated by the plaintiff, or ever assented to or authorized such transactions in any way. And in the absence of such evidence the plaintiff is not entitled to recover upon the notes in controversy, which are admitted to have been discounted at usurious rates.

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*Lazear vs. Natl. Union Bank of Md.*

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6. If the jury shall find that six of the notes offered in evidence, drawn by Lazear Brothers, were discounted by the plaintiff, for the use and benefit of W. D. Schurtz & Co., customers of the said plaintiff, and by whom said notes were endorsed to the plaintiff, and that the same were duly protested for non-payment, and were then, and now are, held by the plaintiff, and that said Schurtz & Co., continued to be customers of said plaintiff down to the time of the institution of this suit, and that a balance in favor of said Schurtz & Co., is credited to them on the books of the plaintiff under date of October —, 1872, and that said balance was carried to the account of said Schurtz & Co., in February, 1873, and that during the month of February, 1873, large sums of money were deposited with the plaintiff by said Schurtz & Co. And shall further find, that neither the balance credited in October, 1872, nor any portion of the subsequent deposits made by Schurtz & Co., as aforesaid, were held or applied by the plaintiff in payment of the said notes given in evidence, then the plaintiff failed to exercise its rights as a Bank, and was guilty of a breach of duty towards the defendant under the guaranty offered in evidence; and if the jury shall find that the plaintiff had funds of Schurtz & Co. in its custody, after the dishonor of said notes, sufficient to pay the same, and did not hold and apply the said funds to the payment thereof, it is not entitled to recover the amount of said notes in this action. Or if the jury shall find the facts first above recited, and shall further find that the plaintiff, after the dishonor of said notes, had funds of Schurtz & Co. in its custody sufficient to pay the said notes in part, but failed so to apply the same, then the plaintiff is not entitled to recover to the extent of such funds on the said notes against the defendant.

7. If the jury shall find from the evidence that the note of June 22nd, 1872, drawn by Lazear Brothers, payable to

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*Lazear vs. Natl. Union Bank of Md.*

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their order ninety-five days after date, for \$5000, was not discounted by the plaintiff for said Lazear Brothers, but that the same was purchased from James Winchester & Son, note and bill brokers, without the knowledge or by the direction of Lazear Brothers, as testified to by the witness, Winchester, then the said note was obtained by the plaintiff in contravention of the seventh sub-section of section 5136. of the Revised Statutes of the United States, defining the powers of the National Banks, and the plaintiff is not entitled to recover the amount thereof under the guaranty offered in evidence.

8. If the jury shall find from all the facts and circumstances offered in evidence, that the guaranty dated February 3rd, 1870, was requested by the plaintiff, and was executed by the defendant to indemnify the plaintiff against loss on notes, either drawn or endorsed by the Messrs. Lazear Brothers, and which the plaintiff had obtained, or might obtain, in the usual and legitimate course of its business; and if they shall further find, that the notes offered in evidence were obtained either from the witness, Winchester, or from others, at a rate of interest greater than that which is allowed by the law of Maryland, then the said notes cannot be protected under the said guaranty, and the plaintiff is not entitled to recover upon the same.

9. If the jury shall find from all the facts and circumstances of the case, that the guaranty dated February 3rd, 1870, was requested by the plaintiff from the Messrs. Lazear Brothers, and was executed and delivered by the defendant with the understanding and intention between the plaintiff and the defendant, and for the purpose of securing the plaintiff against loss in transactions forbidden by law in the usurious purchase or discounting of notes drawn or endorsed by the Messrs. Lazear Brothers, then the said guaranty is illegal and void, and the plaintiff is not entitled to recover upon the same.

10. If the jury shall find from all the facts of this case, that the plaintiff, prior to the 3rd of February, 1870, was a

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*Lazear vs. Natl. Union Bank of Md.*

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National Bank, located in the City of Baltimore, and organized under and by virtue of the provisions of an Act of Congress, approved June 3rd, 1864, entitled an "Act to establish a national currency by a pledge of United States bonds, and for the circulation and redemption of the same," and that the Measrs. Lazear Brothers then were, and thereafter continued to be, merchants of said city, and depositors with and customers of said plaintiff, and that the plaintiff before the said date undertook and agreed to discount notes, either drawn or endorsed by said Lazear Brothers, at a uniform rate of interest greater than that which is allowed by law; and shall further find that subsequently to the agreement aforesaid, the said plaintiff requested from said Lazear Brothers, a guaranty to secure the plaintiff against loss on notes so discounted by the said plaintiff, and that the guaranty offered in evidence was obtained by said Lazear Brothers from the defendant, and by them was delivered to the plaintiff, and was accepted by the plaintiff in contemplation of and for the furtherance and promotion of the said agreement entered into by and between the plaintiff and Lazear Brothers; (if the jury shall find the same,) and if the jury shall also find that on all the notes offered in evidence by the plaintiff, the plaintiff took, received, reserved or charged interest at the rate of seven and one-half per centum, or any rate greater than that which is allowed by the law of the State of Maryland, then the said guaranty was and is a contract made in contemplation and for the furtherance and promotion of acts prohibited by the supreme law of the land, contrary to the policy of the State of Maryland, and with reference to—as recognized by the Revised Statutes of the United States, and is illegal and void, and the plaintiff is not entitled to recover in this action.

*(Eleventh prayer wanting.)*

12. If the jury shall find their verdict for the plaintiff under the instructions of the Court, in assessing the

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Lazear vs. Natl. Union Bank of Md.

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damages to which the plaintiff may be entitled, the jury are not at liberty to award an aggregate sum greater than the respective amounts of principal which they shall find from all the evidence were paid by the plaintiff by way of discount on the several notes offered in evidence, without interest on said principal sums from the maturity of said several notes, and subject to deductions for payments made on account of the same; with interest on such payments in the discretion of the jury.

13. If the jury shall find that the defendant as testified by himself, agreed to the compromise with Schurtz & Co., as set forth or referred to in his letter of Feb. 21st, 1873, and never afterwards agreed to any other composition or arrangement, by deed or otherwise, between said Schurtz & Co. and the plaintiff; and shall further find, that the plaintiff, without the authority, assent or approval of the defendant entered into and accepted the arrangement provided for by the deed of trust offered in evidence, such unauthorized acceptance on the part of the plaintiff, released the defendant from the liability sought to be enforced in this action, on account of the notes discounted for Schurtz & Co. by the plaintiff; which have been offered in evidence.

14. That the plaintiff is not entitled to recover in this action, except as to such of the promissory notes (if any) given in evidence, as the jury may find from all the facts and circumstances in evidence, to have been discounted on the faith of the guaranty of the defendant, offered in evidence, and if the jury shall find that none of said notes were discounted on the faith of said guaranty, their verdict must be for the defendant.—(*Granted as a more definite explanation of the requirement to recovery asked in plaintiff's prayer.*)

And the plaintiff offered the exception following:

The plaintiff excepts to the granting of the fourteenth prayer of the defendant, because there is no evidence in

Lazear vs. Natl. Union Bank of Md.

the cause that the seven notes offered in evidence, were not discounted on the faith of the guaranty. And because there are no facts or circumstances in evidence in the cause, from which the jury can infer that said notes were not discounted on the faith of the guaranty.

The Court refused to grant the plaintiff's prayer, but modified the same, and granted it as so modified, as follows:

1. If the jury find from the evidence that the guaranty offered in evidence by the plaintiff, dated Feb. 3rd, 1870, was executed by the defendant, and accepted by the plaintiff, and that the seven promissory notes offered in evidence were executed by Lazear Brothers, as drawers, and were discounted by the plaintiff, as shown by the evidence, and have been held by the plaintiff ever since, and that they were so discounted by the plaintiff, looking to the said guaranty, and on the faith thereof, and that said Lazear Brothers made default in the payment of said notes, and that they still remain unpaid, except to the extent of the payments offered in evidence, then the plaintiff is entitled to recover the amount of said notes, with interest, less the payments thereon as offered in evidence, unless the jury shall find that the note for \$5000, offered in evidence was in fact discounted by the plaintiff for the use and benefit of Lazear Brothers, at a rate of interest greater than six per cent., in which case the jury will find for the plaintiff only the sum actually advanced by it on said note.

And the plaintiff then offered a second prayer, conforming to the modification of his first prayer by the Court, and as a substitute therefor, which second prayer so substituted the Court granted.

The plaintiff's second prayer was merely a copy of the plaintiff's first prayer, as modified by the Court.

The Court refused all of the defendant's prayers, except the fourteenth which it "granted as a more definite explanation of the requirement to recovery asked in plaintiff's prayer," and rejected the plaintiff's exception thereto.

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*Lazear vs. Natl. Union Bank of Md.*

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Whereupon the defendant excepted to the granting of the plaintiff's first prayer as modified, and of its substituted or second prayer, and to the rejection of the defendant's prayers as aforesaid, and also to the refusal of the Court to exclude the evidence, by his motion prayed to be excluded from the jury.

*Seventh Exception.*—After the case was argued to the jury by the junior counsel for the plaintiff, and was fully argued and concluded by both counsel for the defendant, and was then, and, up to the adjournment of the Court, further argued in part by the senior counsel for the plaintiff; upon the meeting of the Court on the succeeding day, and without further proceeding to conclude his argument, the senior counsel for the plaintiff asked leave of the Court to withdraw the instructions theretofore granted to the plaintiff, and to substitute therefor the instruction following:

3. If the jury find from the evidence that the guaranty offered in evidence by the plaintiff, dated Feb. 3rd, 1870, was executed by the defendant and accepted by the plaintiff, and that the seven promissory notes offered in evidence were executed by Lazear Brothers, as drawers, and were discounted by the plaintiff at the times shown by the evidence, and have been held by the plaintiff ever since, and that said Lazear Brothers made default in the payment of said notes, and that they still remain unpaid, except to the extent of the payments offered in evidence, then the plaintiff is entitled to recover the amount of said notes with interest, less the payments thereon as offered in evidence, unless the jury shall find that the note for \$5000, offered in evidence, was in fact discounted by the plaintiff for the use and benefit of Lazear Brothers, at a rate of interest greater than six per cent., in which case the jury will find for the plaintiff only the sum actually advanced by it on said note.

The Court accepted and granted said prayer, and endorsed thereon: "This prayer is allowed to be offered

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**Lazear vs. Natl. Union Bank of Md.**

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and substituted for that offered yesterday by the plaintiff."

The plaintiff also asked of the Court the instruction following:

4. That the Court will reject the fourteenth prayer of the defendant granted as an explanation of the plaintiff's prayer.

The Court endorsed thereon: "The Court having granted the prayer of the plaintiff in substitution for that offered yesterday, rejected the defendant's fourteenth prayer."

And thereupon the defendant objected to the granting of the two last mentioned prayers of the plaintiff and the substitution of the first thereof for the plaintiff's prayer theretofore granted; and further insisted as a separate ground of objection, that the said two prayers could not, nor could either of them, properly be entertained or granted at that stage of the case, under the rules of the said Court. But the Court overruled the objections, and granted the two prayers of the plaintiff last offered as aforesaid, and permitted the first of said last offered prayers to be substituted for the plaintiff's prayer theretofore previously granted, and the latter to be withdrawn by the plaintiff, which was done; and in conformity with the second of said last offered prayers of the plaintiff, the Court further withdrew and excluded from the consideration of the jury the fourteenth prayer of the defendant, theretofore granted, and rejected the same. To all of which rulings of the Court, and to each thereof, the defendant excepted. The verdict and judgment being for the plaintiff, the defendant appealed.

The cause was argued before BARTOL, C. J., BRENT, GRASON, MILLER and ALVEY, J.



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Lazear vs. Natl. Union Bank of Md.

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*R. Stockett Mathews* and *S. Teackle Wallis*, for the appellant.

I. The propositions of law arising out of the appellant's first, second, fourth and fifth bills of exception, taken to the rejection of testimony which had been offered, for the purpose of enabling the Court to give to the guaranty such a construction as would best accord with the intention of the parties, as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates, as well as the propositions of law embodied in the appellant's first, first and a half, fourth and fourteenth prayers, are all based upon the well-known rule of law, that a guaranty "is to be construed according to what is fairly presumed to have been the understanding of the parties, without any strict technical nicety." *Lee vs. Dick*, 10 *Peters*, 493. And such understanding is to be ascertained from the facts and circumstances accompanying the entire transaction. *Bell, &c. vs. Bruen*, 1 *How.*, 187. To ascertain the intention of the parties is the great object of the Court in construing all instruments, and this is especially the case in acting upon guaranties. *Mauran vs. Bullus*, 16 *Peters*, 528.

"It may now be safely laid down that the proper rule for the construction of a guaranty is that applied to other contracts—to give the instrument that effect which shall best accord with the intention of the parties, as manifested by the terms of the guaranty, taken in connection with the subject-matter to which it relates; neither enlarging the words beyond their *natural import* in favor of the creditor, nor restricting them in aid of the surety." 2 *Rob. Pr.*, 286, citing *Allnut vs. Ashenden*, 5 *Man. & Grang.*, 392, (44 *Eng. Com. L. R.*, 210;) *Muey vs. Rayner*, 22 *Pick.*, 228; *Curtiss vs. Hubbard*, 6 *Metcalf*, 191 and 2; and generally in the United States, "a Court will consider that no party is bound beyond the extent of the engagement, which shall appear from the expression of the

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Lazear vs. Natl. Union Bank of Md.

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guaranty, and the nature of the transaction. *Drummond vs. Pressman*, 12 *Wheat.*, 518. This Court has forcibly said in *Warner vs. Miltenberger's Lessee*, 21 *Md.*, 264, "that the construction of written documents is a matter of law, and is not in ordinary cases to be submitted to the jury as a matter of fact, is true, but where the doubt is produced by the existence of extrinsic and collateral facts not appearing upon the instrument, its consideration ceases to be a matter of mere legal construction, and the intention of the parties is to be sought for by a recurrence to the state of facts as they existed when the instrument was made, and to which the parties are presumed to have reference. The ambiguity in such case is a *latent* one, which may be explained by parol evidence, and submitted to the jury." "Such explanation not being inconsistent with the entire terms." *Warfield vs. Booth*, 33 *Md.*, 63; see also *Reynolds and Sauerwein vs. Davidson*, 34 *Md.*, 662; *Clarke vs. Lancaster's Lessee*, 36 *Md.*, 196.

Referring to policies of insurance, this Court has said, "but where the (their) language is susceptible of *two or more interpretations*, extrinsic evidence is admissible to explain the meaning of the parties thereto, by pointing out, and connecting it with the subject-matter to which it refers." *Planters' Mutual Ins. Co. vs. Deford*, 38 *Md.*, 382; *Frederick County Ins. Co. vs. Deford*, 38 *Md.*, 404.

The Supreme Court of the United States in a recent case, (October Term, 1877,) in passing upon written terms introduced into the body of a printed policy for marine insurance, so as to exempt the company from their risk "*while the vessel was at Baker's Island loading.*" was called upon to construe the extent and nature of the exemption. The construction turned upon the point whether the clause meant *while the vessel was lying at Baker's Island for the purpose of loading*, or while the vessel was there *actually loading*.

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Lazear vs. Natl. Union Bank of Md.

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And Mr. Justice BRADLEY in delivering the opinion of the Court says: "A strictly liberal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties used the words in question, is manifest, we think, *from all the circumstances of the case*. (He does not say 'is manifest from an *inspection* of the instrument—from the *face* of the instrument, but from *all the circumstances* of the case.')

Although written instruments cannot be varied (by addition or subtraction,) by *parol proof of the circumstances out of which they grew, and which surrounded their adoption*, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter, *and the standpoint of the parties in relation thereto*. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable, as that of the language in which the instrument is written." And he quotes with approbation, from 1 *Greenleaf's Ev. sec. 277*, and *Taylor's Ev., secs. 1082 and 1085*, and cites in support of his view, *Thorington vs. Smith*, 8 Wall., 1, and *Maryland vs. Balto. & Ohio Railroad Co.*, 22 Wall., 105.

The offers of testimony which were rejected, had no other object than to inform the mind of the Court, through "preliminary knowledge," "of the actual condition of things at the time" of the execution of the guaranty, "as they appeared to the parties themselves," so that the Court, availing itself "of the light of the surrounding circumstances as they appeared, or must be supposed to have appeared to the parties at the time of the execution of the guaranty," could surely and judicially ascertain their intentions, and their understanding of its terms. *Reed vs. Insurance Co.*, 5 Otto, 30, 31.

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Lazear vs. Natl. Union Bank of Md.

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The guaranty was, as it virtually declared upon its face, a running contract of indemnity in lieu of the guarantor's endorsement upon *certain paper*, to the extent of \$25,000. What was that paper?—notes of Lazear Brothers, of which they were either drawers or endorsers. Surely upon the most casual inspection of such an instrument, the most natural, and most pertinent inquiry which would suggest itself to an unbiased mind, would be this. "Why was this paper executed? What were the circumstances antecedent to, and attending its delivery?" And if these queries had come into the mind of the Court, then there was but one possible mode of gratifying them, and that was by asking for just such proof as the appellant's offers propounded; proof of collateral, extrinsic facts, absolutely essential to a right and true understanding of the instrument.

Looking at the contract, from the standpoint of the parties, at the time of its execution, it is respectfully insisted on behalf of the appellant, that in all cases, upon written contracts, and especially upon guarantees, it is competent for either or both parties to give in evidence, by parol, all the circumstances out of which the contract grew, and which surrounded its adoption, for the purpose of enabling the Court to ascertain the subject-matter and the standpoint of the parties in relation thereto, and to determine, in the light thereof, the sense intended to be conveyed by the language used.

And even if the language as used appears on its face to have but one meaning; it is competent for either party to show, by parol proof of circumstances that there is, nevertheless, ambiguity or uncertainty in it, and to remove that ambiguity or uncertainty by further proof of the same nature. Such evidence is not allowed for the purpose of enabling a new contract to be set up by parol, in derogation of the contract written. It is, on the contrary, sanctioned and encouraged as the best mode of getting at the meaning of the words used by the writer.

*Lazear vs. Natl. Union Bank of Md.*

It puts the Court in his place, informs it of what was in the mind of the parties, and what their attention was directed to, and enables it to judge of the subject to which the words used were intended to apply, and to the application which they were meant to have to the subject. 1 *Greenleaf's Evid.*, secs. 277, 286; 2 *Taylor's Evid.*, sec. 1082; 2 *Wharton's Evid.*, secs. 937 to 941, and notes; *De Colyar on Principal and Surety*, 214, 215; *Browne on Stat. Frauds*, sec. 409 a; *Brandt on Suretyship and Guaranty*, secs. 72, 97, 130, 352, and notes; *Marshall vs. Haney*, 4 Md., 506, '7; *Strawbridge vs. B. & O. R. R. Co.*, 14 Md., 360, 367; *Stockham vs. Stockham*, 32 Md., 207; *Warfield vs. Booth*, 33 Md., 69; *Basshor vs. Forbes*, 36 Md., 166; *Fryer vs. Patrick*, 42 Md., 54, 55; *Wehr vs. Germ. Evang. Luth. Ch.*, 47 Md., 192, 3, 187; *Drummond vs. Pressman*, 12 Wheat., 515; *Bradley vs. Washington, &c., Company*, 13 Peters, 97; *Bell vs. Bruen*, 1 Howard, (S. C.), 183, 186, 187; *Laurence vs. McAlmont*, 2 Howard, 449; *Maryland vs. B. & O. R. R. Co.*, 22 Wall., 105; *Reed vs. Insurance Co.*, 5 Otto, 30, 31; *Shore vs. Wilson*, 9 C. & F., 355, 365; 1 *Chitty on Contracts*, (11th Am. Ed.,) 147-8, and cases cited in notes n and o.

Parol evidence may be given for the purpose of raising and explaining a latent ambiguity. 1 *Chitty on Contracts*, 149, and cases cited in notes, t and t',—especially the cases in the *Massachusetts Reports*, as follows: *Hurley vs. Brown*, 98 Mass., 545; *Stoops vs. Smith*, 100 Mass., 63, and cases cited; *Putnam vs. Bond*, 100 Mass., 58; *Miller vs. Stevens*, 100 Mass., 518; *Pike vs. Fay*, 101 Mass., 134; *Sugden on Vendors and Pur.*, (8th Am. Ed.,) 169, 170, and notes; *Brown vs. Brown*, 8 Metcalf, 576.

"The surrounding circumstances" are frequently looked at, where the contract requires explanation; e. g. to ascertain the subject-matter of the contract. *De Colyar on Guaranty, &c.*, 215, and cases cited in notes 1 and 2; *Heffield vs. Medows*, L. R., 4 C. P., 595; *Chalmers vs.*

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Lazear vs. Natl. Union Bank of Md.

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*Withers*, 16 *W. R.*, 1046; *Cole vs. Pack*, *L. R.*, 5 *C. P.*, 65, 70, 71; *Laurie vs. Scholefield*, *L. R.*, 4 *C. P.*, 622; *Leathley vs. Speyer*, *L. R.*, 5 *C. P.*, 595, 605, 606; *Good vs. Martin*, 5 *Otto*, 90, 91; *Wood vs. Priestner*, *L. R.*, 2 *Exch.*, 66; *Heffield vs. Meadows*, *L. R.*, 4 *C. P.*, 599; *Coles vs. Pack*, *L. R.*, 5 *C. P.*, 69; *Stoops vs. Smith*, 100 *Mass.*, 63; *Sanford vs. R. R. Co.*, 37 *N. J.*, 3, 4; *Peisch vs. Dickson*, 1 *Mason*, 9; *Rayner vs. Wilson and Hunting*, 43 *Md.*, 440.

II. It is respectfully submitted that the inferior Court erred in rejecting the evidence offered as to usury, and set forth in the third exception, and in refusing the appellant's second, third, fifth, fifth-and-a-half, ninth and tenth prayers.

There was abundant evidence *dehors* the rejected interest account, that all dealings between the Messrs. Lazear Brothers and the appellee were tainted with usury, and that all the notes of Lazear Brothers discounted for Messrs. Schurtz & Co. were also tainted with usury; and that the note purchased from Mr. Winchester, the proceeds of which the President of the appellee testified "he was under the impression went directly to the drawers, Lazear Brothers," was shaved and bought at nine per centum.

First.—Was the guaranty void, or voidable by reason of the illegality of the consideration or other illegality of the dealings it was intended to cover? It was in evidence that the discount of seven and a-half per cent. charged the Messrs. Lazear Brothers, was by agreement with them, and that this arrangement had been made prior to the execution of the guaranty, and was in force when that was delivered.

The Revised Statutes of the United States, Title "National Banks," sections 5197 and 5198, prohibit the appellee from taking, receiving, reserving or charging on any loan or discount, on any promissory note a rate of interest greater

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*Lazear vs. Natl. Union Bank of Md.*

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than that allowed by the law of its domicile. A violation of the statute in this respect carries with it a forfeiture of the entire interest which has been taken, charged, &c.

Here then, by special agreement entered into between the appellee and the principals, was a violation of the law by a continuing contract, to affect all transactions between them, and made before the guaranty was executed. How then does the law regard the effect of such a contract with the principals upon the liability of the guarantor? It avoids it, it denies that this suretyship can be perverted to protect a contract which is either expressly, or by implication, forbidden by the common law or by statute. 2 *Chitty on Contracts*, 971.

No right can be derived from any agreement made in express opposition to the laws of the place where it is made. *Hall vs. Mullin*, 5 *H. & J.*, 193.

Here the agreement of the principals was illegal from its origin. The guaranty was exacted by the appellee with reference to it, to make it good. Any security given in payment or discharge of an usurious security is void. 2 *Parsons on Contracts*, 396, and note z.

A contract that is illegal in itself, or that contemplates the violation of some statute \* \* \* cannot invoke the aid of a Court of justice. *Merrick vs. The Bank, &c.*, 8 *Gill*, 64; *Freeman & Sedgwick vs. Sedgwick*, 6 *Gill*, 29; *Bayne vs. Suit*, 1 *Md.*, 85; *De Sobry vs. Delaistre*, 2 *H. & J.*, 191; *Ringgold vs. Tyson*, 3 *H. & J.*, 172.

Gaurantees to indemnify illegal acts are absolutely void. *Addison on Contracts*, 51, (*Ed.* 1857); 2 *Evans' Pothier on Obligations*, 1-15; see *Ives vs. Jones*, 6 *Iredell*, 538.

Usurious securities are not only forbidden as between the original parties, but the illegality of their inception affects them in the hands of third parties. *Lloyd vs. Scott*, 4 *Peters*, 205; *Hill vs. Scott*, 5 *Cranch C. C.*, 523; *Moncure vs. Dermott*, 13 *Peters*, 345; *Walker vs. Bank of Wash.*,

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Lazear vs. Natl. Union Bank of Md.

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3 *Howard*, 62; *The Panama Olcott R. R.*, 343; *Trumbo vs. Blizzard*, 6 *G. & J.*, 18; *Andrews vs. Poe*, 30 *Md.*, 485.

Secondly.—Whatever rule may exist as to the non-forfeiture of an entire debt which is based upon an illegal consideration under the usury laws of Maryland, (and it must be remembered that they differ very materially from the Act of Congress forbidding the inception of usurious contracts) between the parties thereto, or privies, still it is urged that the appellant is entitled to have deducted from the claim made upon the notes in evidence all illegal interest which was received and reserved by the bank after the delivery to it of the guaranty. The appellant guaranteed the payment only of a *legal* debt.

The appellee did what it was forbidden to do, in charging usurious interest. The statute declares that the entire interest so charged shall be forfeited. The Supreme Court has decided that National Banks are not governed by the usury laws of a State—and the only *penalties* incurred by them for taking excessive interest are those imposed by the National Banking Act. (91 *U. S.*, 29.)

The provisions of the Banking Act supersede the laws of the State upon the subject. So that usury does not work a forfeiture only of the excess of interest under that law, as it does under ours.

“Observe, it is the entire interest which the bill or note carries with it that is forfeited. \* \* \* The illegal act destroys the interest-bearing power of the obligation.” *Lucas vs. Gov't Nat. Bank*, 78 *Penn.*, 231.

The appellee has taken that which it had no power, no right to take; its holding is equally prohibited with the taking; it is a wrong-doer, has no property in what it has taken, and its possession is that of a trustee or bailee for the Lazears, and by relation of the guarantor. *Overholt vs. The National Bank of Mt. Pleasant*, 82 *Penn.*, 490; *Brown vs. N. B. of Erie*, 72 *Penn.*, 209.

The surety may plead any equitable *set-off*. *De Colyar on Guaranty, &c.*, 325, 326; *Whitehead vs. Peck*, 1 *Kelly*, 140;



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Lazear vs. Natl. Union Bank of Md.

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*Andrews vs. Varrel*, 46 N. H., 17; *Hollister vs. Davis*, 54 Pa., 508; *Cowen vs. Pillsbury*, 33 N. H., 710; *Cole vs. Justice*, 8 Ala., 793; *Bronaugh vs. Neal*, 1 Robinson, (La.,) 23.

III. The Court erred in rejecting the defendant's seventh prayer. This prayer was intended to apply to the note for \$5000, which the testimony shows was bought of Winchester & Son, note and bill brokers.

The appellee, a National Bank, never acquired any legal title to this note, and had no power or authority as a National Bank, to purchase such a note; the United States statutes, under which it was chartered, and was governed at the time it obtained the note, gave it no such power. *Weckler vs. First Nat. Bank*, 42 Md., 581; *First National Bank of Rochester vs. Pierson*, 24 Minnesota, (*Thompson's Bank Cases*,) 637; *Farmers' & Mechanics' Bank vs. Baldwin*, 23 Minn., 198; *Niagara Co. Bank vs. Baker*, 15 Ohio, 68; *Talmage vs. Pell*, 3 Selden, 328.

Such corporations have no powers, except such as are expressly granted. *Weckler vs. First Nat. Bank*, 42 Md., 581; *Steam Nav. Co. vs. Dandridge*, 8 G. & J., 318; *Fowler vs. Scully*, 72 Penn., 456; *Wiley vs. First Nat. Bank of Brattleboro*, 47 Vermont, 546; *First Nat. Bank vs. Ocean Nat. Bank*, 60 N. Y., 278; 2 Kent Com., 299.

If the appellee had any power to purchase a promissory note, it was by virtue of the Act of Congress, known as the National Banking Act, section 5136 of the Revised Statutes of the United States. This section, of course, is to be construed in the light of the other sections relating to the subject, as well as the general policy of the law relating to banking corporations.

This section provides, that such Bank or association may, by its officers, "exercise under this Act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling ex-

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Lazear vs. Natl. Union Bank of Md.

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change, coin and bullion, by loaning money on personal security, by obtaining, issuing and circulating notes according to the provisions of this Act. \* \* \* And its usual business shall be transacted at an office or banking-house located in the place specified in its organization certificate." The Act, by its last section, provides that Congress may at any time amend, alter or repeal it, so that since the Revised Statutes such banks have been subject to its provisions.

In establishing National Banks, it was not the design of Congress to make them brokers and competitors to an indefinite extent, which would be hazardous to the shareholders, injurious to the credit of the Banks themselves, and destructive of the very object for which they were established.

Of course, if National Banks have the power to purchase promissory notes at all, they may do so to *any extent*, and for any *price*, and upon any *terms* they please. The power to purchase promissory notes is not necessary as one of its *incidental powers* to carry on the business of banking.

Is it given in clear express terms, by any of the provisions of the statute? It cannot be said that the word "negotiating," means purchasing—it means simply power to transfer by endorsement, or otherwise, such promissory notes as the bank may have acquired in its legitimate business. *Weckler vs. First Nat. Bank*, 42 Md., 581.

In construing a statute relating to banking or commercial paper, regard must be had to the commercial meaning of the language used. The word *negotiate*, simply means that the Bank had the power to *sell* that to which it had acquired title by a discounting in the regular course of its business. The power "to negotiate" a bill or note, is the power to *endorse* and *deliver it* to another, so that the right of action thereon shall pass to the endorser or holder. *Per MILLER, J., in Weckler's Case*, 42 Md., 592.

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*Lazear vs. Natl. Union Bank of Md.*

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*Negotiate* and *negotiable*, as applied to promissory notes and bills of exchange, relate to selling and *transferring* such paper, or what may be transferred by a sale and endorsement, or delivery, and collected in the name of the holder. The subsequent clause of said section, relating to what the bank may *buy*, does not include promissory notes. Is it not clear, then, that the power to purchase promissory notes is clearly *denied*, instead of being expressly given? *First National Bank vs. National Exchange Bank*, 2 Otto, 128.

Section 5197, regulating the rate of interest to be taken by the National Banks, is peculiar and guarded in its language. It provides that they "may take, receive, reserve and charge on any *loan* or *discount* made, or upon any *note*, *bill of exchange*, or *other evidences of debt*," such interest as is allowed by the local law. Where there is no rate so prescribed, they are allowed to "take, receive, reserve or charge a rate not exceeding *seven per centum*, and such interest may be taken in advance, reckoning the days for which the *note*, *bill* or *other evidences of debt* has to run. And the *purchase*, *discount* or *sale* of a *bona fide bill of exchange*, payable at another place than the place of such *purchase*, *discount* or *sale*, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." It is impossible to deny that a plain distinction is here drawn between purchasing and discounting commercial paper, and that while the power to purchase bills of exchange is specifically recognized, the power to purchase promissory notes is as conspicuously withheld. Coupling this with the power conferred by section 5136, to *discount* promissory notes, drafts, bills of exchange alike, and the additional power to "*buy exchange*," but not to buy notes, the inference seems irresistible, that the purchase of bills was meant to be allowed by section 5136, and the purchase of notes was not, and that section 5197

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Lazear vs. Natl. Union Bank of Md.

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was deliberately and carefully drawn, to carry out this distinction and accommodate the rule of interest to the differing conditions which it involves.

The Bank not having the power to purchase notes, acquired no title to, and cannot maintain an action upon the note in question. *N. Y. Fireman Ins. Co. vs. Ely*, 5 Conn., 560; *Head vs. Prov. Ins. Co.*, 2 Cranch, 127; *Life and Fire Ins. Co. vs. Mechanics' Ins. Co.*, 7 Wend., 34.

IV. The Court below plainly erred in instructing the jury that the appellee was entitled to recover, even although they should find that the notes sued on as guaranteed, had not in fact been discounted by the appellee on the faith of the guaranty. This ruling the Court arrived at, by reversing its previous instruction to the contrary, embraced in the appellant's fourteenth prayer, and by modifying the appellee's own first prayer, in which it was conceded, that there could be no recovery, unless the notes had been discounted by the Bank, "looking to the said guaranty, and on the faith thereof." The doctrine thus sanctioned is at war with the rudimental principles of the law of guaranty. The fact that the thing done and constituting the ground of action, was done on the faith of the guaranty, is the only consideration in cases like the present, which makes the guaranty obligatory and the guarantor bound. If the thing done was not done on the faith of the guaranty, then the guaranty plainly was no part of the consideration for which it was done, nothing passed from the plaintiff in consideration of the defendant's guaranty; he lost nothing and parted with nothing on account of it or by reason of it.

This is illustrated by the very form of a declaration upon guarantees. 1 *Harris' Entries*, 241, 245; 1 *Evans' Harris*, 219; 4 *Robinson's Practice*, 389 to 392, 398.

And it is the *rationale* of the received doctrine that a guaranty of an existing debt, which was not created at the defendant's request or upon his responsibility, is

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*Lazear vs. Natl. Union Bank of Md.*

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void, unless supported by some new consideration. *De Colyar on Prin. and Surety*, 25; *Standley vs. Miles*, 36 *Miss.*, 434; 1 *Chitty on Contracts*, 62, 740.

It will be found to be the universal doctrine in both the Federal and State Courts. 1 *Chitty on Contracts*, (11th *Amer. Edit.*,) 742, note b<sup>1</sup>, and cases there cited; *Caton vs. Shaw & Tiffany*, 2 *H. & G.*, 22; *Douglas vs. Reynolds*, 7 *Peters*, 119, 120; *Adams vs. Jones*, 13 *Peters*, 213; *Clarke vs. Remington*, 11 *Metc.*, 361; *Mayfield vs. Wheeler, Geiger & Co.*, 37 *Texas*, 259; 2 *Parsons on Contracts*, 7; *Brandt on Suretyship and Guaranty*, sec. 163.

*John N. Steele* and *I. Nevett Steele*, for the appellee.

The questions presented by the first exception arise upon the rejection, by the Court below, of the defendant's offer of parol evidence, for the purpose of showing that the liabilities of Lazear Brothers, for paper discounted for them, and not their liabilities for their paper held by the Bank, but not discounted for them, was the subject of the guaranty; and also of showing what was the subject of the guaranty—what its real consideration—whether or not it was a continuing guaranty; and also to show a latent ambiguity as to the subject of the guaranty. The Court below was right in rejecting this evidence. The language of the guaranty is clear and unequivocal. It extends to and covers "*all liabilities* to said Bank, of Lazear Bros., now existing, or which may hereafter arise;"

\* \* \* "*all paper* that may be held by the Bank of Lazear Bros., either as drawers or endorsers."

The principal purpose of the offer was obviously to contradict the written contract, and substitute for the stipulations which it contains others entirely different; to prove, in direct contradiction of its language, that the guaranty did not cover "*all liabilities*," "*all paper*," but only extended to a particular class of liability or paper; viz., liability incurred on discounts, and paper discounted for the direct benefit and account of Lazear Bros.

Lazear vs. Natl. Union Bank of Md.

It is clear that there was no latent ambiguity in the case when the evidence was offered; and it is equally clear, that the excluded evidence does not show or create one. It does not show two or more classes of subjects to which the language of the guaranty is equally applicable, but seeks to establish new terms in the contract, inconsistent with, and in contradiction of, the written paper.

As to the guaranty being a continuing one, it was sued upon and claimed to be such by the plaintiff; and the excluded evidence did not tend to prove that it was not. The character of the guaranty in this respect is conclusively fixed by its own language, as it in terms extends to "all liabilities now existing, or which may hereafter arise," &c. 2 *Taylor on Ev.*, sec. 1035, (note VII,) 1036, 1053, 1088-9; 1 *Greenleaf on Ev.*, sec. 275; *Frank vs. Miller*, 38 Md., 450; *Clarke vs. Lancaster's Lessee*, 36 Md., 196; *Stockham vs. Stockham*, 32 Md., 196; *Bladen vs. Wells and Wife*, 30 Md., 577; *Taggart vs. Bouldin & Thayer*, 10 Md., 104; *Mitchell vs. Mitchell*, 6 Md., 224; *McElderry vs. Shipley, et al.*, 2 Md., 25; *Stringer vs. Gardiner*, 5 Jurist, (N. S.) 260; *Miller vs. Travers*, 8 Bing., 244; *Bainbridge vs. Wade*, 16 Ad. & Ell., (N. S.) 89; *Boston, &c., Glass Co. vs. Moore*, 119 Mass., 435; *Barnstable Savings Bank vs. Ballou*, 119 Mass., 487; *St. Louis Perpetual Ins. Co. vs. Homer*, 9 Metcalf, 39; *Doe vs. Webster*, 12 Ad. & Ell., 442, 449; *De Colyar on Guaranty, &c.*, 238 to 248; *Goss vs. Lord Nugent*, 5 Barn. & Ald., 58; *Harvey vs. Grabham*, 5 Adol. & Ell., 61-74; *Marshall vs. Lynn*, 6 M. & W., 109; *Mitchell vs. Ins. Co.*, 54 Georgia, 289; *Oliver vs. Shoemaker*, 35 Mich., 464; *McEwan vs. Ortman*, 34 Mich., 325; *Jones vs. Albee*, 70 Ill., 34; *White vs. Ashton*, 51 N. Y., 280; *Ins. Co. vs. Maury*, 6 Otto, 544, 7, 8; *Holmes vs. Mitchell*, 7 C. B., (N. S.) 361; *Grant vs. Naylor*, 4 Cranch, 235.

In respect to the *third* exception. The sections 5197 and 5198 of the Revised Statutes of the United States, to which

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*Lazear vs. Natl. Union Bank of Md.*

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the offer makes reference, authorize the party who has paid usurious interest to a National Bank, or his legal representatives, to recover twice the amount of interest paid, provided the suit is brought within two years. This remedy is exclusive of all others. To the claim now set up by the defendant it is a sufficient answer to say that no suit was brought within the two years. Besides this, no person can sue under the statute, except the party who has paid the usurious interest, and with him it is optional for two years only, whether, having borrowed money at an agreed rate of interest, and having honestly paid the debt, he will seek to recover against the bank the statutory penalty for a contract which he himself had willingly entered into. That which is to be recovered in such a suit is a penalty, and even where two years limitation does not bar, as it does in this case, it could scarcely be maintained that a claim to penalty for past usury in other transactions could be recouped or set off in an action to recover against the drawer of certain notes. However this may be, clearly the plaintiff does not owe the defendant anything upon the evidence in this case; and, therefore, there is nothing to be recouped or set off by him. Further, recoupment is an equitable doctrine, and would not apply to a statutory penalty, and it is also confined to claims arising out of the same transaction, and therefore, would not extend to the claim in this case, which has no connection with the causes of action sued upon. *Abbott vs. Gatch*, 13 Md., 314; *Wiley vs. Starbuck*, 44 Ind., 298; *La Farge vs. Halsey*, 4 Abbott Pr., 397; *St. Louis Perpetual Ins. Co. vs. Homer*, 9 Metc., 39; *Waterman on Set-Off*, 44, 53 and 478-9, notes; 1 *Parsons on Con.*, 246.

Prayers one and one-and-a-half of defendant, submit directly to the jury the construction of the written guaranty, upon the whole evidence in the cause. These prayers were properly rejected.

1. Under the established rule of law, the construction of the written guaranty is for the Court and not the jury.

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*Lazear vs. Natl. Union Bank of Md.*

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2. The construction which, by these prayers, the jury is authorized, upon their views of the parol evidence in the cause, to give to the written paper, changes and contradicts the plain and unambiguous meaning of the paper itself. The law does not permit either Court or jury to give such effect to parol evidence. There would be an end of this rule, if what was meant and intended by a written contract was left to be found by a jury upon such parol proof as the parties might bring before them.

The defendant's second, third, fifth, fifth-and-a-half, eighth, ninth and tenth prayers relate to the effect of usury on the plaintiff's right to recover.

The second, third, eighth, ninth and tenth, are all open to the objection that they leave it to the jury to interpolate a new term into the contract, by finding that it was intended to cover or not to cover usurious transactions, when the written contract itself covers all paper and all liabilities, without making any such distinction or limitation. Whether the contract applied to usurious discounts, was a question for the Court.

Of the seven notes offered in evidence by the plaintiff, six were discounted for Schurtz & Co., and the usurious interest was paid by them. The seventh note was *purchased* from Winchester & Son, according to the view on the part of the appellant, and not discounted at all; and no question of usury could, in that event, arise upon it. The appellee contends, however, that it was in fact discounted for Lazear Brothers, and is to be so treated and regarded.

The fifth prayer asks *the Court* to say that the guaranty, properly construed, does not apply to these usurious transactions.

Prayer five-and-a-half asks the Court to say that there was no evidence in the cause that defendant contemplated or knew of the usurious transactions, and that without such evidence the plaintiff could not recover.



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*Lazear vs. Natl. Union Bank of Md.*

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All these prayers seem to be founded on one or the other of the two propositions, that the guaranty, if valid, could not protect or be applied to usurious transactions; or, that if the guaranty was given for the purpose of covering such transactions, it was illegal and void.

Each of these propositions is, upon principle and authority, vitally erroneous, and the Court below properly rejected these prayers.

1. The usury did not make void the notes usuriously discounted, or the contract of the defendant to be liable upon them as the endorser.

Sections 5197 and 5198 of the Revised Statutes of the United States, do not make a usurious contract void, but provide specific penalties for the infraction of their provisions; the penalty where usurious interest has been actually received by the National Bank, as in this case, being the right conferred on the party who has paid the interest to recover back twice its amount; provided the suit be brought within two years.

Where the statute has not declared the contract void, and has fixed a specific penalty for usury, the Courts cannot inflict a greater penalty by debarring recovery, and thus forfeiting the whole debt. *Wiley vs. Starbuck*, 44 Ind., 298; *Fleckner vs. U. S. Bank*, 8 Wheaton, 338, 355; *Farmers and Mechanics' Nat. Bank vs. Dearing*, 1 Otto, 29; *Burnhisel vs. Firman*, 22 Wall., 170; *Harris vs. Runnels*, 12 Howard, 79; *Bandel vs. Isaac*, 13 Md., 202; *Dudley vs. Mayhew*, 3 N. Y., 9.

2. The penalty of twice the amount of the usurious interest can, under the terms of the statute, only be recovered by the party who has paid that interest, or his legal representatives. This would be so held by the Courts, even if the language of the statute was not so specific, because the person paying the usury is the party injured, and, therefore, rightly entitled to the remedy.

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Lazear vs. Natl. Union Bank of Md.

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This being the only forfeiture imposed, if the party entitled to it does not deem it right or proper to sue, no one else who may be liable on the note usuriously discounted, as endorser, drawer or otherwise, has any right to impeach the note on the ground of usury. It is good as to all the world.

The liability of the defendant was, by the terms of the guaranty, that of an endorser; but whether his suretyship was by means of endorsement or guaranty, if he intended that the paper guaranteed should not be usuriously discounted, he should have so stipulated. In the absence of such a stipulation, even in the case of discounts for Lazear Brothers, they were left at liberty to make their own terms as to interest. In the case of the six notes discounted usuriously for Schurtz & Co., manifestly the rate of interest did not concern the defendant. *National Bank vs. Garlinghouse*, 22 Ohio, 492; *Selser vs. Brock*, 3 Ohio St., 302; *Hough vs. Horsey*, 36 Md., 181-185; *Smith vs. Exchange Bank, &c.*, 26 Ohio, 141.

The proposition asserted in the defendant's seventh prayer is that if the note was obtained by purchase, and not by discount, the bank could not recover on it.

Mr. Taylor proves that this note was presented to the Board of Directors, and was purchased or discounted by their order—that the Board did not consider paper offered by brokers, until the offering of customers was disposed of, and that then, if the Bank had unemployed funds, it sometimes invested them in outside paper—that it never bought or discounted a note from a broker, except when there was more money on hand than was employed in discounting the regular offering of customers. Mr. Taylor also proved that at the time of buying or discounting this note he had an impression, he believed, that it was for the benefit of Lazear Brothers, and that they were getting the proceeds of it.

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*Lazear vs. Natl. Union Bank of Md.*

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Winchester proves that Winchester & Son, brokers, tendered and sold the note to the plaintiff for the drawers, who received the proceeds of sale.

1. Even then, if the jury should find that Lazear Brothers did not direct the brokers to offer the note at the National Union Bank, and did not know that it was so offered, still the brokers were their agents, to negotiate the paper, and, without disclosing their principals, obtained the money on the note for them. Of course, if Lazear Brothers had, themselves, offered the note, and got the money, less the discount, it would have been a discounting of the note in the strictest sense of that term. If they did the same thing by their agent, and ratified his act by receiving and keeping the money, it was equally in law and fact, a discount of the note for them.

If, then, it be conceded, for the purposes of the argument, that section 5136 of the Revised Statutes did not give the Bank power to purchase the note, yet this transaction upon the facts referred to was authorized, because Lazear Brothers were, in truth, the borrowers of the money upon their own note, and it was, in fact, discounted for them. The prayer, therefore, which utterly ignored these facts, was properly rejected. It would be a most unjust and unreasonable construction of section 5136 of the Statutes, and a violation of the plain principles of the law of agency, to hold that *Lazear Brothers* could get from the Bank the money for their own note, less the discount, and then be permitted to refuse payment of it, because their agent in the matter did not disclose his principal, and the Bank, therefore, although it believed, yet did not positively know, that the money was obtained for them when it took the note.

2. The words of the Statute, "by discounting and negotiating promissory notes," do not necessarily mean discounting only for a party to the note, but may reasonably include discounting for any holder of such paper. But if

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Lazear vs. Natl. Union Bank of Md.

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this be not so, and there be no express authority to *buy* promissory notes, as part of the general business of banking, yet it would seem to be clear, that as a power necessarily incidental to that business, which includes the receipt of deposits, the National Banks have the right, when the regular business of banking leaves a surplus of money on hand unemployed, instead of letting that surplus lie idle, to invest it temporarily in promissory notes, if such investment shall be deemed advisable.

3. But even if the purchase of a promissory note is, under all circumstances, in contravention of section 5136 of the Statutes, the note is not thereby made void, and the right of recovery upon it defeated.

In construing these general public Statutes, the rule is to look for the intention of Congress, and to give such construction as will best carry that intention into effect. Now, the National Banks are agencies and instrumentalities of the United States Government; they hold its bonds; they obtain from it notes for their circulation, &c.; and the Government, as well as the public, has an interest in their soundness and stability. The Statute is an invitation to those who have capital, to subscribe as stockholders, and create these institutions, and it aims to promote and protect the interests of the Government, the public, and the stockholders. In view of this, it is not possible to suppose that Congress intended that the purchase of a note by a Bank should make the note void and defeat recovery upon it. Such a construction would inflict a direct loss and injury upon the stockholders and the Bank, and, to that extent, injuriously affect the soundness of the Bank, and the interests of the Government and the public therein; and would promote and protect the interest of no one, except the debtor, who seeks to avoid payment of an honest debt. If Congress had intended to visit the Banks with such a penalty, it would have said so.

It may be added that the money having been given for the note by the Bank, the contract was an executed one,

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Lazear vs. Natl. Union Bank of Md.

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and the Bank would, therefore, be entitled to recover. *Gold Mining Co. vs. Nat. Bank*, 6 Otto, 640; *Shoemaker vs. Nat. Bank*, 2 *Abbott's C. C. R.*, 416; *Stewart vs. Nat. Bank*, 2 *Abbott's C. C. R.*, 424; *Shoemaker vs. Nat. Mech. Bank*, 31 Md., 396; *National Union Bank of St. Louis vs. Matthews*, (U. S. Supreme Court,) vol. 7 of "*The Reporter*," 257, 259, 260; *Farmers' Bank vs. Dearing*, 1 Otto, 29; *Fleckner vs. U. S. Bank*, 8 *Wheat.*, 338, 355; *Bandel vs. Isaac*, 13 Md., 202; *Wiley vs. Starbuck*, 44 Ind., 298.

The plaintiff's prayer, as first granted, put it to the jury to find, not only that the guaranty was "accepted by the plaintiff," but also that the notes offered in evidence were discounted by the plaintiff, "looking to the said guaranty, and on the faith thereof." The defendant, by his fourteenth prayer, asked the Court to say that the plaintiff could not recover, except as to such of said notes as the jury might find, from all the facts and circumstances in the case, were "discounted on the faith of the guaranty," &c. This was granted by the Court "as a more definite explanation of the requirement to recovery asked in the plaintiff's prayer." Subsequently, upon the application of the counsel for the plaintiff, the prayer of the plaintiff was modified by omitting the words "looking to the said guaranty and on the faith thereof;" and the defendant's fourteenth prayer, which had been granted as an explanation of those words, was rejected.

The question then is, whether the prayer, as finally granted, is correct in point of law? If it is, then the fourteenth prayer of the defendant was properly rejected. It may be observed that the last clause in the prayer, in reference to interest, was inserted with the view of putting the prayer in a form that would leave no question for controversy, and not because the counsel for the plaintiff were of the opinion that the law required them to make that concession.

At the trial of the cause, it was expressly proved by Mr. Taylor, the President of the Union Bank, that the

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Lazear vs. Natl. Union Bank of Md.

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notes offered in evidence were discounted on the faith of the guaranty, and there was no evidence to the contrary. The fourteenth prayer of the defendant was, therefore, upon this ground, properly rejected.

The paper sued upon in this case was not a letter of credit or an offer to guaranty, but was, by its terms and upon its face, an absolute guaranty. It had been accepted by the Bank. This was so found by the jury, to whom the question of acceptance was submitted by the prayer, (perhaps unnecessarily,) and, in fact, was not denied by the defendant, who paid that portion of the claim against him, which fell within the guaranty as he construed it. The contract between the parties was thus complete. What are its terms? It guarantees "*all liabilities to said Bank, of Lazear Brothers,*" to the extent of \$25,000, and goes on to say, "I hereby holding myself liable to the Bank to that extent, *for all paper that may be held by the Bank, of Lazear Bros., either as drawers or endorsers,*" &c. Obviously, this is a general guaranty, limited only in amount. It is not of liabilities incurred or paper acquired in a particular way, or for a specified purpose, but of all liabilities—of all paper held by the Bank. When, therefore, the Bank, having accepted the guaranty, proved that it discounted the notes offered in evidence, and was still the holder of them unpaid, it brought itself within the clear and express terms of the contract; and the guaranty attached. To require it to prove affirmatively, in order to make out its case, that each note had been discounted on the faith of the guaranty, would be to interpolate a new term into the contract, inconsistent with, and contradictory of, its express provisions. The very least effect which can be given to the language of the guaranty is to relieve the Bank from the offering of such proof. *Mason vs. Prichard*, 2 Camp., 436; 12 East, 227; *Merle vs. Wells*, 2 Camp., 413; *Martin vs. Wright*, 6 Ad. & Ell., N. S., 917; *Coles vs. Pack*, L. R., 5 C. P., 63; *Ex parte Littlejohn*, De

. Lazear vs. Natl. Union Bank of Md.

*Colyar*, 304; 3 *M. D. & D.*, 182; *Stadt vs. Lill*, 9 *East*, 348.

Even in the case of a guaranty not general in its terms, if it be absolute, or if it be accepted, and the act named in it, as the ground of the guaranty, be performed, the guaranty, *prima facie*, attaches. Every guaranty of future transactions, impliedly requests that such transactions shall take place. To guaranty to a merchant the cost of goods thereafter to be supplied by him to a third person, impliedly requests that goods shall be supplied, and if he accepts the guaranty and supplies the goods, the law presumes that he supplied them under, and in pursuance of, the request. The same rule applies to the case of a guaranty to a Bank of paper of a third person which may be thereafter held by it.

The acceptance of the guaranty, and the performance of the act for which it calls, sufficiently prove the averment that the plaintiff confided in the promise of the guarantor. *Douglas vs. Reynolds*, 7 *Peters*, 126; *Caton vs. Shaw & Tiffany*, 2 *H. & G.*, 21.

The guaranty in this case was a formal one, absolute on its face, and had also been accepted. It is believed that no case can be found in the English or American Reports in which a plaintiff who had proved those facts was required to prove anything further, except that he had complied with the terms of the guaranty by doing the thing which it called for. *Griffith vs. Turner*, 4 *Gill*, 111; *Sloan vs. Wilson*, 4 *H. & J.*, 322; *Ferris vs. Walsh*, 5 *H. & J.*, 306; *Grant vs. Ridsdale*, 2 *H. & J.*, 186; *Mitchell vs. McCleary*, 42 *Md.*, 374-377; *Yard vs. Eland*, 1 *Raymond*, 368; *Smith vs. Dunn*, 6 *Hill*, 543; *Whitney vs. Groot*, 24 *Wend.*, 82; *Jackson vs. Yandes*, 7 *Blackford*, 526; *Fishmonger's Co. vs. Robertson*, 5 *M. & G.*, 131-176, MAULE, J.; *Oxley vs. Young*, 2 *H. Black.*, 613; *Train vs. Gold*, 5 *Pick.*, 380; *Lent vs. Puddleford*, 10 *Mass.*, 230.

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Lazear vs. Natl. Union Bank of Md.

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The guaranty in this case was a continuing guaranty. This sufficiently appears on the face of the paper. *De Colyar on Guaranties, &c.*, 238 to 248. ' "

GRASON, J., delivered the opinion of the Court.

This suit was instituted on a written guaranty of the appellant to the appellee, which was executed on the third day of February, 1870, and is in the following words: "For value received, I hereby guarantee to the National Union Bank of Maryland, at Baltimore, all liabilities to said Bank, of Lazear Brothers, now existing, or which may hereafter arise, to the extent of twenty-five thousand dollars, I hereby holding myself liable to said Bank to that extent for all paper that may be held by the Bank of Lazear Brothers, either as drawers or endorsers, in the same manner as if endorsed by me, I hereby waiving notice of protest of such paper."

The first question presented for our determination is, whether parol evidence is admissible to show that the guaranty was intended to cover only such paper as was received by Lazear Brothers from their customers living out of Baltimore, and endorsed by Lazear Brothers and discounted by the Bank, and such other paper drawn or endorsed by them as might be discounted *for the benefit* of Lazear Brothers by the Bank. The rule is very well settled that parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a written instrument. Where parties have entered into a written agreement, it is only reasonable to suppose that they have introduced into the written instrument every reasonable and material term and circumstance; and, consequently, all parol testimony of conversations made by either of them, whether before or after, or at the time of the completion of the contract, will be rejected. 2 *Taylor's Ev.*, sec. 1035; 2 *Greenl. Ev.*, sec. 275; *McElderry vs. Shipley*, 2 *Md.*, 25. All oral negotiations or stipulations between



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*Lazear vs. Natl. Union Bank of Md.*

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the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it, and the written instrument is treated as the exclusive medium of ascertaining the agreement of the parties to it. *Bladen vs. Wells*, 30 *Md.*, 581. This rule should be more rigidly enforced in a case like the one now under consideration, where the Statute of Frauds requires the contract to be in writing to make it valid. Where that Statute requires the contract to be in writing, it cannot be partly in writing and partly in parol. *Frank vs. Miller*, 38 *Md.*, 460; *Moale vs. Buchanan*, 11 *G. & J.*, 322.

But it was contended by the counsel of the appellant, that the parol evidence, offered in this case and rejected by the Superior Court, was admissible for the purpose of raising and explaining a latent ambiguity in the guaranty; that is, that there was more than one class of paper, held by the Bank, to which the contract of guaranty might be applied, and that the parol evidence was admissible to show that the parties intended it to apply to and cover only such paper as should be discounted by the Bank *for the benefit* of Lazear Brothers. Such evidence would have been a palpable contradiction of the plain language of the guaranty, for by its very terms it covers all liabilities of said Lazear Brothers existing at the date of the execution of the contract, or which might thereafter arise, to the extent of twenty-five thousand dollars, and, to that extent *all* paper that might be held by the Bank upon which Lazear Brothers were either drawers or indorsers. There is no obscurity or ambiguity in the language employed, nor any uncertainty as to the subject-matter upon which the contract was intended to operate. The guaranty in plain and express language is made to apply to *all paper*, either drawn or endorsed by Lazear Brothers and held by the Bank, without any distinction as to whether it was discounted for the benefit of themselves or some other party. In other words, the evidence which was objected to and

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*Lazear vs. Natl. Union Bank of Md.*

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ruled out, could have had no other effect than to limit and restrict the terms of the guaranty, and to show that the language used in it did not mean what it clearly and plainly expressed. The admission of such parol evidence would be a violation of the rule, to which we have adverted, and, therefore, there was no error in refusing its admission for the purpose for which it was offered, or in rejecting the appellant's prayers numbered one, one-and-a-half, and four.

It was contended, that the guaranty is void, because usurious interest was demanded and received by the Bank upon the notes now held by it, and the non-payment of which is the foundation of this suit. The United States Banking Law authorizes Banks, organized under its provisions, to receive the same rate of interest that is allowed by the laws of the States in which such institutions are located, and no more, and provides that, if more is demanded and received, the whole interest shall be forfeited or that twice the amount of interest so paid may be recovered by the person paying it, or his legal representatives, provided suit for that purpose be brought within two years from the date of the usurious transaction. See ch. 3, secs. 5197 and 5198 U. S. Revised Statutes. There is no provision, however, declaring an usurious contract void. While, as a general rule, contracts, which are in violation of the common or statute law, are void, yet this rule does not apply to cases like the present. In most of the States there are laws regulating the rate of interest, and yet we have been referred to no case, and have found none, in which a contract has been declared void, by reason of the fact, that a greater interest than that allowed by law, has been received under it, unless the law itself has provided, that the taking of illegal interest shall render the contract void. This Court, in the case of *Lester vs. The Howard Bank*, enforced the contract, notwithstanding the Bank had made the loan to Purvis, its President, in

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*Lazear vs. Natl. Union Bank of Md.*

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violation of the terms of its charter, and in that case this Court said, "cases are to be found, arising under contracts made in violation of a statute, in the application to which of the general rule, Courts have been governed by the plain and obvious purposes of the law; and, in such, it has been repeatedly held, that an action would lie against a party receiving money under such a contract, upon a promise implied by law to refund it."

In the case of *Fleckner vs. U. S. Bank*, 8 *Wheat.*, 355, Mr. Justice STORY, in delivering the opinion of the Court, says: "The taking of interest by the Bank beyond the sum authorized by the charter, would, doubtless, be a violation of its charter, for which a remedy might be applied by the Government; but as the Act of Congress does not declare, that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." See also *Bandel vs. Isaac*, 13 *Md.*, 224, to same effect.

We think it very clear, that the demand and receipt by the Bank of usurious interest upon the notes, offered in evidence, does not avoid the contract between the appellant and the appellee. There was therefore no error in the refusal to grant the third, fifth, fifth and a half, eighth, ninth and tenth prayers of the appellant, nor in refusing his motion to withdraw from the jury the notes which had been offered in evidence subject to exception. But it was also contended, that the usurious interest, received by the Bank upon the discount of paper, upon which Lazear Brothers were drawers or endorsers, should be recouped or set off against the amount of the notes offered in evidence. It must be borne in mind, that none of the paper of Lazear Brothers discounted by the Bank, was discounted for the benefit of the appellant, and that none of the usurious interest, taken by the Bank, was paid by him. It was paid by Lazear Brothers and Schurtz & Co., and they, and not the appellant, have been the

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Lazear vs. Natl. Union Bank of Md.

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sufferers by the exaction of illegal interest. If the notes had been discounted at the rate of interest prescribed by law, the appellant would have been in no better situation than he is now, for, if bound at all, he would have been liable for the amount of the notes, with legal interest thereon from the date of their maturity to the time of the trial of the case. But it has been frequently held that no one, except the party, who has paid it, can recover the usurious interest paid. *Smith vs. Exchange Bank of Pittsburg*, 26 *Ohio State Reps.*, 152; *Scott vs. Leary*, 34 *Md.*, 395; and *Hough vs. Horsey*, 36 *Md.*, 184. It will be found too that sec. 5198 of the Banking Act, gives the remedy in such cases to the party, who has paid the usurious interest, and to his legal representatives, provided, they bring suit to recover it back within two years from the date of the usurious transaction. It was optional with the parties, who paid it to the appellee, to institute proceedings for that purpose or not, and they have not thought proper to do so within that time and they are, therefore, now without remedy.

The Superior Court of Baltimore City was, therefore right in excluding from the consideration of the jury the statement, of the interest paid, as set out in the third exception, and in rejecting the appellant's twelfth prayer.

The appellant's seventh prayer is based upon the theory, that the note of Lazear Brothers for five thousand dollars, dated June 22nd, 1872, which was obtained by the appellee from Winchester & Son, note and bill brokers, was not *discounted* but *purchased*; that such purchase was not authorized by the Banking Act, and, consequently, that the appellee obtained no title to the note, and was not entitled to recover upon it. Sub-sec. seven of the Act enumerates the powers which are conferred upon institutions, organized under the law, and provides that such institutions "shall have all such incidental powers as shall be necessary to carry on the business of banking; by dis-

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*Lazear vs. Natl. Union Bank of Md.*

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counting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by *buying and selling exchange, coin and bullion*; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. This rule of law is so well settled that we need refer to no other case than that of *Weckler vs. First National Bank*, 42 Md., 591. The only power to *buy and sell*, with which National Banks are clothed, is the authority given by chap. 1, sec. 5137, sub-secs. 1, 2, 3 and 4, to purchase real estate for the special purposes and under the circumstances therein stated. The Act plainly shows that it was the intention of Congress to so limit and restrict National Banks, as to prevent them from exacting and receiving a greater rate of interest than is authorized by the laws of the States, within which such institutions may be respectively located, and to prohibit them from becoming buyers and sellers of promissory notes. The evidence shows that Winchester and Son, note and bill brokers, were employed by Lazear Brothers to sell the note of June 22, 1872, to any purchasers willing to buy, and that it was sold to the appellee, over the counter of its banking house, at nine per cent. discount, for Lazear Brothers, the drawers, who received the proceeds of sale. None of the Bank officers were informed that the Winchesters were acting for Lazear Brothers, nor were the latter told to whom the note had been sold. The note was sold to the Bank on the eighth day of July, 1872. The President of the Bank testified that the note in question was purchased by order of the Board of Directors, and that he had an impression, he believed, that Lazear Brothers were to get the proceeds of it. He further proved that, after the cus-

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Lazear vs. Natl. Union Bank of Md.

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tomers of the Bank were served, it sometimes invested its surplus proceeds in notes. We are of opinion that this transaction was an out and out purchase by the Bank, and that such purchase was without authority, and that the Bank acquired no title to the note and cannot recover thereon in this suit. While we do not mean that a National Bank may not invest its surplus *capital* in notes, we are of opinion that it has no authority to use such surplus funds, as may remain on hand from day to day, for the purpose of buying notes. *National Bank of Rochester vs. Pearson, Thompson's Bank Cases*, 637; *Farmers and Mechanics' Bank vs. Baldwin*, 23 *Minnesota*, 198. If any other construction were given to such a transaction as this, the intention of Congress to prohibit National Banks from buying and selling notes would be entirely defeated, and those institutions would be at perfect liberty to decline making discounts for their customers, and afterwards to buy up the very paper, which had been offered for discount and refused, at such price as the Bank might choose to give. The note of the 22nd June, 1872, for five thousand dollars was acquired by the appellee by *purchase* without authority to make such purchase, and it is not, therefore, entitled to the note and cannot recover upon it, and the appellant's seventh prayer ought to have been granted.

The guaranty of the appellant is shown to have been executed by him and accepted by the appellee, and the subsequent discounting of paper, of which Lazear Brothers were drawers, or which they had endorsed, furnishes *prima facie* evidence that such discounts were made upon the faith of the guaranty. But such *prima facie* evidence may be rebutted by other proof offered by the guarantor, or by facts and circumstances put in evidence by the appellee. Whether the money was parted with by the appellee on the faith of the guaranty or otherwise, is a question exclusively for the determination of the jury, and there are

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*Lazear vs. Natl. Union Bank of Md.*

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some facts and circumstances appearing in the evidence, as contained in the record, which should have been submitted to the consideration of the jury, whose duty it is to determine to what weight, if any, they are entitled. We are of opinion, therefore, that there was error in rejecting the appellant's fourteenth prayer. It follows from what we have said that there was also error in granting the appellee's modified prayer, because it permitted the jury to find for the appellee the amount of the five thousand dollar note, after deducting the usurious interest received upon it, and also because it took from the jury the question whether the money obtained from the appellee had been loaned upon the faith of the guaranty.

The sixth and thirteenth prayers of the appellant were waived, or abandoned at the argument of the case, and we need not refer to them further than to say, that we think there was no error in rejecting them.

As there was error in rejecting the seventh and fourteenth prayers of the appellant, and in granting the modified prayer of the appellee, the judgment appealed from will be reversed and a new trial awarded.

*Judgment reversed, and  
new trial awarded.*

(Decided 19th June, 1879.)

ALVEY, J., delivered the following dissenting opinion.

I cannot agree with the majority of the Court in their conclusion as to the want of power in the Bank to acquire title to the note of \$5000, obtained from Winchester & Son. That note was made and endorsed by Lazear Brothers, and was negotiated by Winchester & Son as agents of the makers, long before the note matured. Whether the Bank knew at the time of the negotiation that the money advanced upon the note was for the makers

Lazear vs. Natl. Union Bank of Md.

and endorsers of the paper, is a question, I think, quite immaterial. If Lazear Brothers had presented the paper in person and obtained the money upon the terms upon which the brokers obtained it, there would then have been no question as to the legality of the title acquired by the Bank; that, it is conceded, would have been a discount. But it is contended, and it is so held in the opinion of the majority of this Court, that, as the note was obtained from Winchester & Son, bill brokers, without disclosure at the time from them that the money was for the benefit of the makers of the note, therefore it was a purchase of the note, as contradistinguished from a discount, and that the transaction was *ultra vires*, and consequently no title to the note was transferred to the Bank. To this proposition I cannot assent.

This question, of course, depends upon the proper construction of certain provisions of the National Bank Act, under which the appellee was organized. The general purpose of its organization was "for carrying on the business of banking." By the terms of the National Bank Act, (*U. S. Rev. St., sec. 5136,*) the Bank is clothed with all the powers, except such as are expressly prohibited, usually given to and exercised by banking corporations. It is expressly authorized to exercise "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes." Besides the things thus enumerated which the Bank is in terms authorized to do, there are many other things that it may do, under the general power to carry on the business of banking. There is no express power given, for instance, to certify checks, or to collect notes, checks, or bills of exchange, for account of customers or correspondents; and



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Lazear vs. Natl. Union Bank of Md.

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yet we know that such transactions constitute a large portion of the legitimate business of banking. It does not follow, therefore, that everything is prohibited that is not expressly authorized. By *sec. 5197, U. S. Rev. Sts.*, it is provided that any banking association "may take, receive, reserve, and charge on any *loan or discount* made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, etc., where the Bank is located, and no more," etc. This latter provision is under the title, "Regulation of the Banking Business."

Now, without invoking the aid of any implied power possessed by the Bank, to enable it to carry on the banking business, it is expressly authorized, as we have seen, to discount and negotiate promissory notes. What, then, is the meaning of the word "negotiate," according to its ordinary acceptation among business men? According to the most approved lexicographers, its meaning is "to transfer, to sell, to pass, to *procure by mutual intercourse and agreement with another*, to arrange for, to settle by dealing and management." *Webster's Dic.; Worcester's Dic.* This term would seem to be comprehensive enough for all the requirements of the case; but, by allowing the full meaning to the more exact and important term, "discount," all doubt whatever would seem to be removed. To discount is to deduct a sum of money from the debt in consideration of its being paid before the usual or stipulated time for payment. In the case of *Fleckner vs. Bank U. S.*, 8 *Wheat.*, 350, Judge STORY, in delivering the opinion of the Court, having occasion to define a discount by the Bank, said: "Nothing can be clearer than that, by the language of the commercial world, and the settled practice of Banks, a discount by a Bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the

**Bank.** We must suppose that the Legislature used the language in this, its appropriate sense; and if we depart from this settled construction, there is none other which can be adopted, which would not defeat the great objects for which the charter was granted, and make it, as to the stockholders, a mere mockery." Purchase may be by way of discount, equally as a loan may be made by that means. When the party receiving the proceeds of the paper discounted is himself either maker or endorser, and the discount is made on his responsibility, he receives the money as a loan, for he is bound to return it; but if he is in no way bound on the paper, he receives the money as an advance, and as a consideration for the transfer of the paper. Both transactions are, according to the established practice and usage of Banks, discounts, though the latter is in effect a purchase by the Bank. The act of discounting simply has reference to the deduction from the face amount of the paper for the time it has to run to maturity, and the rate of that deduction; but whether the transaction amounts to a loan or to a purchase on the part of the Bank, depends upon other facts and condition of things. This idea of restricting the power of discounting to a transaction in which money is actually loaned upon the credit of the party passing the paper, it seems to me, is novel, and, I am sure, is contrary to the received understanding of the commercial community, and the established practice and usage of Banks. Suppose the payee of a promissory note payable to order takes it to a Bank and procures the money on it, less the rate of discount, upon endorsement without recourse; would that not be strictly a discount within the meaning of the law, notwithstanding it would not be a loan upon the responsibility of the party obtaining the money? Such a transaction would not be a loan at all, according to the correct meaning of the term; and yet if it be a discount, according to the modes and usages of banking, why should not any third

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*Lazear vs. Natl. Union Bank of Md.*

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party holding paper payable to bearer, or endorsed in blank, be able to negotiate that paper with the Bank, by way of discount, and transfer a good title to the Bank, notwithstanding his name might not appear upon the paper, or he incur any liability in respect to it? I cannot, I must confess, perceive the reason for the distinction that has been made in this case. It should be recollected that it is not the rate of discount, with reference to which the parties deal, that determines the question of the validity of the transfer of the paper, or the title of the Bank, though the latter may have exacted and received more than the lawful rate of discount. All the business of the National Banks is done under the restrictions prescribed by the Act of Congress; and the rate of discount is expressly prescribed, among the various regulations contained in the Act for the government of the banking business; and for taking, receiving, or charging any greater rate of interest or discount than is by the Act allowed, the Bank subjects itself to the penalties prescribed by *sec. 5198, of the Revised Statutes*; but the title to the paper is not thereby affected. However the transaction here involved might be characterized if it were between individuals—whether it be called shaving or otherwise—as a bank transaction, if the Bank exacted a greater deduction from the face value of the paper than the law allowed, it was excessive discount, for which it incurred the penalties of the Statute; but the transfer of the paper vested a good title in the Bank. And as by the opinion of the majority of the Court it is declared that the Bank acquired no title to the note in question, and is therefore not entitled to recover on it, I must respectfully dissent from that portion of the opinion, though I concur in the conclusions as to the other portions of the case.

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Lazear *vs.* Natl. Union Bank of Md.

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After the announcement of the foregoing decision, the appellee, by its counsel, applied to the Court for a re-hearing of the question presented by the seventh prayer of the appellant, as to the right of the appellee to recover on the note of Lazear Brothers for \$5000, dated the 22nd of June, 1872. The Court, in response to this application, directed a re-argument on notes.

Notes were filed on behalf of the appellee by *John N. Steele* and *I. Nevett Steele*, and on behalf of the appellant by *T. Alex. Seth*, *R. Stockett Mathews* and *S. Teackle Wallis*.

BARTOL, C. J. and BOWIE, BRENT, GRASON, MILLER, ALVEY and IRVING, J., participated in the decision on the re-argument.

GRASON, J., delivered the opinion of the Court.

This case was argued and decided by this Court at the April term, 1879, and is now before us again upon a re-argument granted upon the motion of the appellee. The re-argument was asked only upon the appellant's seventh prayer, which was based upon the theory that the note of Lazear Brothers for five thousand dollars, dated June 22nd, 1872, which was obtained by the appellee from Winchester & Son, note and bill brokers, was not *discounted* but *purchased*; that such purchase was not authorized by the Banking Act, and, consequently, that the appellee acquired no title to the note, and could not recover upon it. This question was most thoroughly and ably discussed by the counsel of the respective parties, and after a very careful consideration of the case, it was held that the appellee acquired the note in question by *purchase*, and not by *discount*, that such purchase was not authorized by the Banking Act, and that the appellee acquired no title to the note and could not recover upon it. This question has again been very fully argued upon notes,

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Sabel *vs.* Slingluff, Guard., *et al.*

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filed by the counsel of the respective parties, and has again been carefully considered, and a majority of the Court concur in the opinion, heretofore filed in the case, and in the conclusions therein reached.

The judgment appealed from, will, therefore, be reversed, and a new trial awarded.

*Judgment reversed, and  
new trial awarded.*

(Decided 1st July, 1880.)

NOTE.—The Reporter is requested to state, that Chief Judge BARTOL, who concurred in the opinion of the majority first rendered, entertaining doubts as to the correctness of the decision upon the question presented by the appellant's *seventh prayer*, requested a re-argument of that question; and upon the final disposition of the case after the re-argument, concurred in the views expressed by Judge ALVEY in his dissenting opinion. Judge IRVING concurred with Chief Judge BARTOL and Judge ALVEY in their dissent.

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HENRIETTA J. SABEL, by her husband GEORGE SABEL,  
as next friend *vs.* FIELDER C. SLINGLUFF, Guardian,  
and others.

*Right of Husband to money received from the Sale of his  
Wife's Real estate—Debt due by Husband to Wife—Statute  
of Limitations—Equity Pleading.*

Money received by a husband from the sale of his wife's real estate, made before the adoption of the Code, belongs to the husband absolutely, unless *at the time he received it* he promised the wife to repay it, and obtained possession of it upon the faith of such promise.

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Sabel *vs.* Slingluff, Guard., *et al.*

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The receipt of money under such circumstances as would make the husband liable therefor, merely creates a *debt* due by him to his wife, and against such a debt the Statute of Limitations runs, and it will be barred unless sued for or claimed in due time after disability of coverture removed.

A bill to carry out the directions of a will for the sale of real estate, with prayer for general relief, is not a creditors' bill, and the filing of such a bill does not prevent the running of the Statute of Limitations, as against a debt due to the complainant, and recoverable under a creditors' bill.

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER and ALVEY, J., for the appellant, and submitted on brief for the appellees.

*Samuel S. Pleasant*, for the appellant.

*Fielder C. Slingluff*, for the appellees.

MILLER, J., delivered the opinion of the Court.

Edward Whittemore died in February, 1872, leaving a widow and five infant children. By a clause in his will he devised all his property, real and personal, to his wife "as long as she shall remain single," and requested that "the property be sold," and "the proceeds invested for the benefit of her and her children;" but "in case she should marry again, then she is only entitled to her third." He appointed his wife his executrix, and she administered the personal estate in the Orphans' Court, and her administration account shows, that after payment of debts, there remained in her hands the sum of \$381.73. In August, 1874, the widow in her own right, and as

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*Sabel vs. Slingluff, Guard., et al.*

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next friend of her children, filed a bill in equity, praying a sale of his real estate under the above clause of her husband's will. On this bill a decree was regularly obtained, and sales made by the trustee, and the proceeds brought into Court. In June, 1878, she filed a petition in the equity cause, alleging, that after her marriage to him, she loaned to her first husband the sum of \$2000, which she had received from a sale of her own property, and that he promised to re-pay the same, but never did, and praying that this debt may be paid to her out of the proceeds of the real estate, his personal estate being insufficient to pay the same. This claim being resisted by the infant children, was rejected by the Court below, and from the order dismissing her petition this appeal is taken. In our opinion the claim was properly rejected.

In the first place, the testimony to support it, the petitioner herself being the principal witness, is very meagre and unsatisfactory. It is admitted that her marriage with Whittemore took place in the spring of 1859, and that the property from which this \$2000 was derived was sold in August of that year. Whether this money was paid by the purchaser of the property to the wife or to the husband, is left in great uncertainty. In her examination-in-chief, she says she kept the money and loaned it to him in 1862, but on cross-examination she says the money which came from the sale of the property was paid to her husband. Again, she says her husband promised to re-pay the loan a great many times, and constantly during his life recognized it as a debt due to her, but whether the promise to re-pay was made before or at the time he received the money, or whether he obtained it on the faith of such promise is not stated, and she admits she never took from him any evidence of the indebtedness. In fact the proof is altogether different from that in *Drury and Wife vs. Briscoe*, 42 Md., 154, where the claim of the wife was sustained. The transac-

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*Sabel vs. Slingluff, Guard., et al.*

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tion having occurred prior to the adoption of the Code, the case would seem to fall within the decision in *Plummer and Wife vs. Jarman*, 44 *Md.*, 637, where it is said: "The money arising from the sale of the wife's inheritance, was not her separate estate, as it would be now under the provisions of the Code, but on the contrary, it was subject to the control of the husband by virtue of his marital rights; and the husband's rights having attached, the money as it was received by him, was at his disposal absolutely, and any mere promise that he may have made to his wife as to its application was purely voluntary and without consideration."

But assuming we are wrong in this, and that there was a sufficient consideration for the promise made by the husband, the only effect was to create a *debt* due by him to his wife, and that debt was clearly barred by the Statute of Limitations, which we understand from the arguments of counsel on both sides, was relied on by the infant defendants in the Court below, even if the answer of their guardian, reserving all matters of defence, either in fact or in law, were not to be regarded as a sufficient interposition of the plea. We find nothing in the record to prevent the operation of the Statute. The petitioner in her testimony says she mentioned the claim to the Orphans' Court, and they told her the property all belonged to her, and she thought it was not worth while to say anything more about it. The bill which was filed in 1874 was not a creditors' bill, but for a sale of the property, in order to carry out the directions of the will. The insertion of a prayer for general relief in that bill, cannot have the effect to convert it into a creditors' bill for the sale of the realty to pay debts upon an insufficiency of personal assets, so as to prevent the running of the Statute as against a debt due to the complainant and recoverable under such a bill. Unquestionably then the first presentation of this claim as against the proceeds of



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Conway *vs.* Log Cabin Perm. Build. Ass'n of Balto.

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the real estate was by the petition filed in 1878, more than five years after her husband's death, and it was therefore clearly barred by the Statute.

*Order affirmed, and  
cause remanded.*

(Decided 19th June, 1879.)

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CHARLES H. CONWAY *vs.* THE LOG CABIN PERMANENT  
BUILDING ASSOCIATION of Baltimore City.

*Assumpsit—Loan—Action on the Case—Principal not liable  
for act of Agent not authorized, and not subsequently Rati-  
fied.*

An action of *assumpsit* cannot be maintained to recover a sum of money promised to be loaned.

Whether an action on the case for breach of contract, in not loaning the money promised, can be maintained. *Quære?*

A. having become a member of a Building Association, applied for the loan of a sum of money. It was agreed to loan the money upon the security of a mortgage on certain real property in Baltimore County, if the counsellor of the Association should report favorably upon the title. The mortgage was accordingly executed and taken by the counsellor of the Association, with the assent of A. to Towson town, where he went for the purpose of ascertaining the title of A., by an examination of the records. He found the title unsatisfactory, and so reported to the Association. The mortgage, however, was left in the clerk's office, and there placed upon record. The cloud upon the title was never removed to the satisfaction of the counsellor of the Association, though time was given to A. for the purpose, and the money agreed to be loaned, was never paid to A. The mortgage was put upon record by the counsellor of the Association, without its authority or knowledge.

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Conway vs. Log Cabin Perm. Build. Ass'n of Balto.

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It had no knowledge by its proper officers of the recording of the mortgage, until about the time of the bringing of the suit by A. The action of its counsellor was not ratified or confirmed by the Association. In an action against the Association by A. to recover upon its promise to loan the sum agreed upon, it was HELD :

That, as no actual notice of the recording of said mortgage was given to the defendant's board of directors, until at or about the time of the bringing of the suit by A., and as the defendant never ratified the act of its counsellor in leaving said mortgage for record, the plaintiff was not entitled to recover.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER and ROBINSON, J.

*James H. Gable and Charles E. Phelps*, for the appellant.

*Orlando F. Bump*, for the appellee.

BRENT, J., delivered the opinion of the Court.

This is an action of assumpsit, brought by the appellant upon a promise of the appellee to loan him \$1022.

The appellant became a member of the defendant Association in December, 1875, and on the evening of his admission applied for a loan of the above sum of money. This was afterwards agreed to be loaned to him upon the security of a mortgage on certain real property in Baltimore County, if the counsellor of the Association, Mr. H. Edgar Johnson, should report favorably upon the title.

The mortgage was accordingly executed and taken by Mr. Johnson with the assent of the appellant to Towson-town, in Baltimore County, where he went for the purpose of ascertaining the title of the appellant by an examination of the records. He found the title unsatisfactory,

Conway vs. Log Cabin Perm. Build. Ass'n of Balto.

and so reported to the Association. The mortgage however was left in the clerk's office and there placed upon the records.

Time was given to the appellant to remove the cloud upon the title, which was not done to the satisfaction of the appellee's solicitor, and the money agreed to be loaned was never paid over to the appellant.

And hence the cause of this action.

The case has been argued at great length, a number of questions presented and a great many authorities cited.

We think the appellant has failed to show any sufficient cause of action.

The attempt to recover by an action of assumpsit a sum of money promised to be loaned is to us a novel one, and we have been referred to no case in which such an action has been maintained. We are satisfied, from the known learning and ability of the counsel who represented the appellant in the argument, if any such case exists, it would have been cited.

We have failed to see any principle upon which an action like this can be supported. The appellant is not entitled to the money claimed, *as his absolutely*—his only claim to it, to say the most, is solely as a temporary loan.

How and in what form could a judgment be entered so as properly to limit the time, for which the money sought to be recovered is to be held by the plaintiff?

The judgment could only be for a sum of money certain, and would finally settle and determine that that amount belonged to the plaintiff. It would be conclusive upon the parties; and would as a necessary consequence estop the defendant from afterwards claiming that the money so recovered was loaned to the plaintiff.

We are clear that this action cannot be maintained. The remedy of the appellant might be by an action on the case for breach of contract, but certainly cannot be in assumpsit.

Conway vs. Log Cabin Perm. Build. Ass'n of Balto.

Another difficulty in the way of the appellant's right of recovery, is the non-acceptance by the Association of the mortgage which he executed. This is made the subject of the eighth prayer of the defendant, which was granted by the Court, and it is proper that it should be referred to and passed upon in this opinion.

The recording of the mortgage is presumptive evidence of its acceptance, but this presumption is one which may be rebutted by other proof. The appellant as a member of the defendant Association is bound by its constitution and by-laws. The duties assigned by the constitution to the counsellor of the Association, Mr. Johnson, do not authorize him to place its mortgages upon record. In this case the mortgage was put upon the records by him without the authority or knowledge of the Association. The proof shows that it had no knowledge by its proper officers of the recording of the mortgage, until about the time of the bringing of this suit. The action of its counsellor was then not only not ratified, but in effect repudiated, and by no action of the Association since that time has it been confirmed.

Upon these facts the Court properly instructed the jury by granting the defendant's eighth prayer, that if they find "no actual notice of the recording of said mortgage was given to the defendant's board of directors, until at or about the time of the bringing of this suit, and that the defendant never ratified the act of its counsellor in leaving said mortgage for record, then the plaintiff is not entitled to recover."

These views entirely dispose of this case. The other questions raised at the argument thereby become immaterial, and unnecessary for its decision, and we do not deem it proper to express an opinion upon them.

*Judgment affirmed.*

(Decided 20th June, 1879.)

WILLIAM G. CRENSHAW President of the Atlantic and Virginia Fertilizing Company vs. DANIEL W. SLYE.

*Sufficiency of Instruction as to what must be found by the Jury to constitute a Warranty—Objection not subject to Review by the Appellate Court.*

In an action to recover on a promissory note, given for a certain fertilizer, the Court instructed the jury as follows: 1st. "If the jury find from the evidence in this case, that the note upon which this suit is brought, was given for the fertilizer called 'Eureka,' and that the said 'Eureka' was bought by the defendant upon the representation of the plaintiff, or his agent, that said 'Eureka,' was a valuable fertilizer; and shall also find that the said 'Eureka' so sold to the defendant, if they find it was so sold, was valueless and worthless as a fertilizer, then the plaintiff is not entitled to recover." 2nd. "If the jury, however, find that the said 'Eureka' so sold to the defendant, was a valuable fertilizer, and possessed merit as such, then the plaintiff is entitled to recover." On appeal by the plaintiff, it was HELD:

That the Court sufficiently instructed the jury as to what they must find to constitute a warranty.

An objection as to the time of the production of evidence will not be reviewed on appeal.

APPEAL from the Circuit Court for St. Mary's County.

The nature of the case is stated in the opinion of the Court.

*First Exception.*—The defendant offered certain testimony, to the admissibility of which, at the time of the offer of the same, the plaintiff objected, but the Court (BRENT, C. J. and FORD, J.) overruled the objection, and permitted such testimony to go to the jury; the plaintiff excepted.

Crenshaw *vs.* Slye.

*Second Exception.*—The defendant offered the following prayer:

If the jury find from the evidence in this case, that the defendant received no benefit from the fertilizer, for which the note filed in this case was given, they must find for the defendant; provided they further find, that said fertilizer was properly applied and used.

And the plaintiff prayed the Court to instruct the jury as follows:

First. That if the jury find from all the evidence in this case, that the note in controversy was given to the plaintiff by the defendant in settlement for  $2\frac{1}{2}$  tons of fertilizer, called "Eureka," sold and delivered to the defendant at his request, by the plaintiff or his agent, and that the fertilizer so sold to the defendant, contained—

Soluble and precipitated phosphoric acid, 6 to 11 pr. ct.

Insoluble phosphoric acid ..... 4 to 6 "

Organic matter..... 20 to 35 "

And yielding ammonia..... 2 to 4 "

which was that which the plaintiff or his agent represented the said fertilizer to contain, that then the jury must find for the plaintiff, although they may further find from the evidence, that the defendant did not get beneficial and satisfactory results from the application of said fertilizer to his land.

Second. That the burden of proof is upon the defendant, to show to the jury that the fertilizer sold and delivered to him did not contain the constituent elements or ingredients mentioned and described in the plaintiff's first prayer.

But the Court refused to give the instructions asked, and instructed the jury as follows:

1st. If the jury find from the evidence in this case, that the note upon which this suit is brought, was given for the fertilizer called "Eureka," and that the said "Eureka" was bought by the defendant upon the repre-

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Crenshaw vs. Slye.

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sensation of the plaintiff, or his agent, that said "Eureka" was a valuable fertilizer; and shall also find that the said "Eureka" so sold to the defendant, if they find it was so sold, was valueless and worthless as a fertilizer, then the plaintiff is not entitled to recover.

2nd. If the jury, however, find that the said "Eureka" so sold to the defendant, was a valuable fertilizer, and possessed merit as such, then the plaintiff is entitled to recover.

To the refusal of the Court to grant the prayers of the plaintiff, and to the instructions given, the plaintiff excepted. The verdict being for the defendant, the plaintiff appealed.

The cause was argued for the appellant before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J.

*Arthur W. Machen*, for the appellant.

There was error in the refusal of the plaintiff's prayers, and in the instructions given.

The proposition of the plaintiff's first prayer, that, if the ingredients of the fertilizer were as represented, the fact that the defendant's use of it may not have proved beneficial to him constituted no defence, cannot, be successfully disputed, and, while the Court refused the prayer, the instructions given did not afford the plaintiff the benefit of it.

It was incumbent on the defendant, in order to meet the presumption arising from the promissory note, to show affirmatively a want of consideration, by proving that the Eureka in question did not contain the ingredients or constituent elements the brand on the bags represented them as containing; and consequently the plaintiff's second prayer, as to such burden of proof, should have been granted.

The actual instructions were erroneous, and tended to mislead the jury. The record shows that the representa-

tions referred to in the first instruction were representations made by the plaintiff's agent, not to the defendant, nor for the purpose of being communicated to the defendant, but to a previous customer, a certain Mr. Hancock, who received them from the agent in the year 1876, and, whether influenced by them or not, bought the fertilizer in that year, and used it with great benefit. Hancock imparted the information of his experience, as well as of the commendations of the agent, and so it was, it appears, that the defendant also, without himself ever seeing the agent, became a purchaser in 1877, through the instrumentality of the same neighbor, Hancock, whom he authorized to procure the Eureka for him. Therefore, when the jury were told that, if they found that the Eureka was bought by the defendant upon the representation of the plaintiff's agent that the Eureka was a valuable fertilizer, they might find in that the basis of a defence, they were directly authorized to find for the defendant because of his having acted upon representations which were not made to him at all, nor intended for him, but which came to him indirectly and by hearsay. Now, independently of all consideration of the character of the representations themselves, it was error to direct the jury to hold the plaintiff responsible for what his agent thus said in 1876 to a *third party*.

It is a well-established principle of law that preliminary representations, whatever effect they may be supposed to have in inducing the succeeding contract, do not (in the absence of fraud,) bind the party making them. It is not enough that the article "was bought upon the representation;" it is further necessary that, by the intention of the parties, the representation is continued into the contract, and made an integral part of it. *Benjamin on Sales*, sec. 567, p. 497; *Humphreys vs. Comline*, 8 Blackf., 516.

Even where the word "warranty," is used in an oral representation, it is a question to be submitted to the jury



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Crenshaw vs. Slye.

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whether a warranty was intended, or only an expression of opinion or high commendation. *Starnes vs. Erwin*, 10 *Ired., N. C.*, 226.

The instruction, therefore, in omitting this essential element, and failing to require the jury to find that the representation was a part of the contract, was erroneous and cannot be supported.

In point of fact the representations in question could not have been intended to be part of the contract with the defendant, having been made altogether without reference to him, and to a different party, and in a previous year.

The important point is also involved in the case, whether a representation by an agent, (even if made to the party,) that a well known fertilizer is a *valuable* fertilizer, is such a representation as justifies the purchaser in refusing to pay for it, if, upon trial, the results indicate that it was without value as a fertilizer, the article itself being just what it appeared and was represented to be—that is of the composition, and containing the ingredients, stated. Is that such a representation as, upon the best authorities, is to be treated as equivalent to a warranty?

*Simplex commendatio non obligat*, is a maxim of the English law. The worth of a thing is matter of opinion, and in matters of opinion, each party must stand and act independently of the other. All commerce is founded on the recognition of this doctrine. *Wentworth vs. Dows*, 117 *Mass.*, 16; *Weimer vs. Clement*, 37 *Penn.*, 147; *Whittaker vs. Eastwick*, 75 *Penn.*, 232; *Fraley vs. Bispham*, 10 *Barr*, 320; *Eagan vs. Call*, 34 *Penn.*, 236; *Prideaux vs. Bunnett*, 1 *C. B. N. S.*, 613, (87 *Eng. C. L.*;) *Ollivant vs. Bayley*, 5 *Q. B.*, 288, (48 *Eng. C. L.*;) *Chanter vs. Hopkins*, 4 *M. & W.*, 399; *Welsh vs. Carter*, 1 *Wend.*, 185; *Bryant vs. Pember*, 45 *Verm.*, 487; *Knox vs. Exchange Bank*, 13 *Wall.*, 383.

If a representation that a fertilizer is valuable is to be understood as a representation that it will produce bene-

ficial effects, the cardinal distinction between promissory statements and statements of existing facts, applies—a distinction illustrated in a recent case of great authority in the Supreme Court of the United States. *Sawyer vs. Prickett*, 19 Wall., 160.

The doctrine of *caveat emptor*, in its particular application to sales of fertilizers, was thoroughly considered by the Court of Appeals of Virginia, in the case of *Mason vs. Chappell*, and upon that decision, and the very clear and able opinion delivered by ROBERTSON, J., we rely as fully covering the present case. 15 *Grattan*, 572.

In Maryland, the doctrine has been ever maintained with inflexible rigor. *Rice vs. Forsyth*, 41 Md., 389; *Hyatt vs. Boyle*, 5 G. & J., 110; *Gunther and Rodenwald, vs. Atwell*, 19 Md., 157.

No appearance for the appellee.

IRVING, J., delivered the opinion of the Court.

The suit, in which this appeal was taken, was instituted upon a promissory note of the appellee to the appellants, for one hundred and twenty-three dollars. The *narr.* contained the ordinary money counts, with a special count setting out the promissory note. The appellee pleaded *non assumpsit*, and under the general issue proved that the note was given for two and one-half tons of a fertilizer called "Eureka," of which the plaintiffs were manufacturers, and offered evidence tending to prove certain representations at the time of the sale, respecting the value of the fertilizer, which were claimed to amount to a warranty, and upon which the appellee relied in the purchase.

The main question is, did the Court, in the instructions given the jury, in lieu of the instructions asked by the respective parties, correctly instruct the jury as to what they must find to entitle the appellants to recover? In other words, were the elements of evidence necessary to

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Crenshaw vs. Slye.

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make a warranty from representations sufficiently stated in the instructions. No question of the admissibility of evidence under the pleadings, or of its legal sufficiency to support the instructions is before us under the record.

The rule of law is, that any affirmation of the quality of the article, made at the time of the sale, intended as an assurance of the fact stated, and relied on and acted on by the purchaser, will constitute an express warranty. This rule all the authorities lay down, and it is not thought necessary to make special citations. Whether such representations were made with the intention of securing a sale, and were relied on by the purchaser, is for the jury, to be inferred from the nature of the sale and the circumstances of the particular case. *Benjamin on Sales*, 409 and 500. The simple question is, then, did the Court sufficiently instruct the jury as to what they must find to constitute a warranty? By the first instruction the Court said "If the jury find from the evidence in this case, that the note, upon which this suit was brought, was given for the fertilizer called "Eureka," and that the said "Eureka" was bought upon the representation of the plaintiff or his agent, that said "Eureka," was a valuable fertilizer; and shall also find that the said "Eureka," so sold to the defendant, if they find it was so sold, was valueless and worthless as a fertilizer, then the plaintiff is not entitled to recover." This Court does not think this instruction asserts that bare commendation is a warranty; but think it sufficiently instructs the jury on the matter of their inquiry. It requires them to find that the note was given "upon" the representations made. That the representations were the procuring means of securing the appellee's name to the note. It does not simply say, that if the note were given for the fertilizer and that certain representations were made, they must find for the defendant; but it states that the note must be found to have been given "upon" such representations, which is the same thing as

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Walter and Wife vs. Foutz.

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saying in consequence of them. If that were so, and the jury found that the representations were untrue, and that the "Eureka" was utterly valueless as stated in the instruction, the appellee was entitled to the verdict as the jury were instructed. We do not think that the jury could reasonably misunderstand the instruction as given; and we think that it did sufficiently instruct them. If the first instruction given by the Court was justified by the proof, and we must assume that it was, then the prayers of the plaintiff were correctly rejected, because they ignored entirely the representations of the plaintiff respecting the value and virtue of the fertilizer. The second instruction given by the Court being the converse of the first was properly given.

As to the question of evidence which was excepted to, it would seem that no objection was taken to its admissibility as evidence, but only as to the time of its production. That being wholly within the discretion of the Court, we cannot review it.

*Judgment affirmed with costs.*

(Decided 20th June, 1879.)

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EDMUND T. H. WALTER and ELIZABETH, his Wife  
vs. DAVID E. FOUTZ.

*When an Auditor's accounts may be reviewed on Appeal, though not Excepted to below—Usurious transactions.*

Where accounts are stated by the auditor to represent the views and claims of the respective parties under their instructions, such accounts may be reviewed on appeal, though no exception thereto was taken in the Court below by either party.

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Walter and Wife *vs.* Foutz.

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In August, 1871, an arrangement was made by which the appellants were to obtain a loan for two years from the appellee, of the sum of thirty-seven hundred dollars, the same to be secured by mortgage. The mortgage was accordingly executed and delivered, the sum of two hundred and twenty-two dollars being retained by the mortgagee from the amount, to secure the payment of which the mortgage was given, as a *bonus* for the loan. In August, 1873, the time for the payment of the loan was extended, and the further sum of two hundred and sixty-two dollars, was demanded by the mortgagee, and paid by the mortgagors, as a condition of the continuance of the loan. In August, 1875, a like extension was made, and the further sum of one hundred and thirty-one dollars, on a like condition, was demanded by the mortgagee, and paid by the mortgagors. Upon the expiration of the time for the re-payment of the loan, default was made, and the mortgaged premises were sold. **HELD:**

That the retention of the first named sum, and the demand and payment of the two other sums were usurious transactions, and in the distribution of the proceeds of the sale of the mortgaged premises, the mortgagors are entitled to have said sums credited upon the mortgage debt as of the times when they were respectively paid.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, GRASON, MILLER and ALVEY, J.

*Alex. H. Hobbs*, for the appellants.

It was said in *Lucas vs. National Bank*, 28 P. F. Smith, (Pa.) 232, that the over-payment of interest is "a trust fund," and the party to whom payment is made "is a trustee or bailee" of the party paying the usury.

In *Brown vs. Second National Bank*, 22 P. F. Smith, 212, it was said that in case of a series of notes and renewals thereof, and suit brought on the *last* note, usurious interest paid on the antecedent notes may be pleaded in the

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Walter and Wife *vs.* Foutz.

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suit on the *last* note as payment *pro tanto* thereon, as all of the notes were *tainted* with usury.

In *Overhalt vs. National Bank*, 82 Penn. St. Rep., 494, it was decided that in "a series of renewal notes given for the continuation of the same original loan or advance, the taint of usury in the first transaction follows down the descent through the entire line." The Court treated the payment of *usurious interest* as "*a credit*" payment on the principal debt.

This question is elaborately and carefully examined by Justice SHARSWOOD in *Campbell vs. Sloan*, 12 P. F. Smith, 485 and 486, wherein it was said: "These payments, as payments of interest, were avoided by the statute, and became payments on account of the principal."

In *Carroll vs. Kershner*, 47 Md., 276, it was decided that: "If more than legal interest has been extorted by the mortgagee, the Court, in distributing the proceeds (of sale,) may direct it to be withheld or refunded." See also, *Powell vs. Hopkins*, 38 Md., 13.

In *Md. Perm. Land and Building Society of Balto. vs. Smith and Carroll*, 41 Md., 522, it was said "that the question of usury can only arise upon the *statement of the final account by the auditor*, and cannot be urged as an objection to the sale."

It was said in *Hill vs. Reifsnider*, 46 Md., 556, that the mortgagor was entitled to credit for the amount paid, "*including bonus and interest on bonus.*"

It is difficult to see upon what ground the learned Court below based the action of sustaining the exceptions interposed by the appellee. It is clear, I think, if the several *usurious payments* had been presented to the auditor before he stated the account on the mortgage sale, these payments would have been allowed. They were not presented, however, but the account was remanded for that purpose.

Courts of equity have gone very far towards relieving a party against usurious exactions. In *Doub vs. Barnes*, 1

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Walter and Wife *vs.* Foutz.

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*Md. Ch. Dec.*, 128, it was determined that "a party who has paid a judgment founded on a usurious debt, may ask to be relieved as to the amount paid beyond what was legally due and recoverable; and this may be done without paying or offering to pay anything, because the application for relief is predicated upon the averment that too much has been already paid."

A party omitting to make the defence of *usury* at law, may still be relieved in equity. See *Hitch vs. Fenby*, 6 *Md.*, 218.

*Fielder C. Slingsluff*, for the appellee.

The account filed by the appellee, having been finally ratified and confirmed by the Court below, and no exceptions having been filed thereto by the appellants, they have no appeal therefrom to this Court. This Court has said, in a similar case, "the record does not show that any exceptions to the ratification of this account were filed in the Court below. By the Act of 1861, chapter 33, it is provided, among other things, that on an appeal from a Court of Equity, *no* objection to *any* account stated and reported in said cause shall be made in the Court of Appeals, *unless* it shall appear by the record that such objection has been made *by exceptions filed in the Court from which such appeal has been taken*. The consequence is, the order appealed from must be affirmed." *The Citizens' Security and Land Company of Baltimore vs. Wilson*, 50 *Md.*, 90.

This ends the appellants' case; and it avails them nothing whether the exceptions to their account be overruled or not, as the same question has been settled in the account already finally ratified.

GRASON, J., delivered the opinion of the Court.

From the record in this case it appears that in August, 1871, there was an arrangement made by which the ap-

pellants were to obtain a loan, for two years, from the appellee, of the sum of thirty-seven hundred dollars. A mortgage for that amount was accordingly executed and delivered by the appellants to the appellee, and at the same time there were also signed and delivered to him four notes for the interest on thirty-seven hundred dollars, payable in six, twelve, eighteen and twenty-four months. The appellants, however, received from the appellee, but thirty-four hundred and seventy-eight dollars, two hundred and twenty-two dollars having been retained by the appellee as a bonus. In August, 1873, the time for the payment of the loan was extended, other interest notes being given, and the further sum of two hundred and sixty-two dollars being demanded by the appellee and paid by the appellants. In August, 1875, the loan was again extended for two years more, interest notes were given, and the sum of one hundred and thirty-one dollars was demanded by the appellee and paid by the appellants. Upon the expiration of the time for the re-payment of the loan, default was made and the mortgaged premises were sold. The auditor stated an account which was finally ratified, but upon the petition of the appellants the Court below ordered other accounts to be stated, upon the evidence then in the case and thereafter to be adduced, under the instructions of the solicitors of the respective parties. The first account which had been ratified was filed in Court by the auditor by direction of the solicitor of the appellee, and another account was stated under the instructions of the solicitor of the appellants, by which certain payments made to the appellee, and alleged to be usurious, with interest thereon from their times of payment, were allowed as credits upon the mortgage. To this account the appellee filed exceptions which were sustained, the account rejected, and the account stated under the appellee's instructions was finally ratified, and from the order thus disposing of the accounts this appeal was taken.



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Walter and Wife vs. Foutz.

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It was contended by the solicitor of the appellee that as no exception was taken in the Circuit Court of Baltimore City, to the account which was ratified, this appeal is not properly in this Court, and referred, in support of this proposition, to the case of *The Citizens' Security and Land Company of Baltimore vs. Wilson*, 50 Md., 90. In that case, however, there was but one account stated by the auditor, and to that no exceptions were filed. But the law is different where accounts are stated to represent the views and claims of the parties to the cause, under their instructions, and no exceptions are then required by either party, and objections may be taken to the accounts. This was expressly decided by our predecessors in the case of *Dennis and Rush vs. Dennis' Executors*, 15 Md., 150. The accounts filed in this case were stated under an order of Court, which directed the auditor to state accounts from the evidence then in the cause and thereafter to be adduced before him, and under the instructions of the solicitors of the respective parties, and they were so stated, and are, therefore, under the decision above referred to, properly before this Court for review.

The exceptions filed to the account stated under the instructions of the solicitor of the appellants, relies upon the Statute of Limitations, to defeat their claim to have the payments, alleged to be usurious, credited against the mortgage debt. If such payments were tainted with usury, this defence cannot avail the appellee. Where usurious interest has been exacted, it must be credited as of the time of its payment, to the payment of the legal interest, if there be any due, and if not, then to the principal debt. No point was made upon this exception by the appellee's solicitor, either in his brief or argument, and it may be inferred that it was abandoned.

Another ground of exception to that account was, that the mortgaged premises had been sold for taxes after the execution of the mortgage, and purchased by the appellee.

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Walter and Wife vs. Foutz.

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This ground of objection may also be regarded as having been abandoned, as no point was made upon it either in the brief or argument of the appellee's solicitor, especially in view of the fact that the taxes were allowed out of the proceeds of the sale under the mortgage, in both the accounts filed by the auditor.

The only remaining question to be decided is, was the retention of the sum of two hundred and twenty-two dollars from the amount, to secure the payment of which the mortgage was given, and the demand and payment of the two other sums upon the extension of the loan usurious transactions? It is perfectly clear that the first mentioned sum retained from the amount of the loan was a *bonus* for the loan, for it is admitted to be such in express terms by the appellee's solicitor, in a statement furnished by him to the appellants. The other two sums could not have been paid to Mr. Slingluff for services rendered the appellants, as suggested by him, inasmuch as the record shows that he was acting as solicitor of the appellee during the whole time through which the loan and its extensions ran, and it cannot be presumed that he acted as solicitor, or counsel, for both parties. Neither could it have been paid as commissions for Mr. Crowl, as the record does not show that he had any connection whatever with the transaction between the parties, nor is he even named in the record. These payments were in excess of the legal interest, for which interest notes were given. The sum deducted from the loan at the time it was made is admitted to have been a *bonus*, and Mr. Walter swears that the payment of the other two sums was demanded as a condition of the continuance of the loan, and no witness was produced to contradict his evidence, which could readily have been done if what he swore to was not the truth. We think it clear that all these sums were demanded by the appellee, and paid by the appellants, as a consideration for the loan and the

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Stonebraker vs. Zollickoffer, et al.

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extensions of the time of re-payment. That such transactions are usurious cannot be questioned since the decision by this Court in the case of *Andrews vs. Poe*, 30 Md., 487, 488. In that case the mortgage was given to secure the re-payment of a loan of six thousand dollars; the mortgagee gave the mortgagor his check for the six thousand dollars, and received from him the legal interest, and in addition the sum of seven hundred and twenty dollars, and that transaction was held to be usurious. Viewing the facts and circumstances of the case now before us in the light of the law as applied to the case of *Andrews vs. Poe*, it is clear that the demand and payment of the sums of money at the times of making and extending the time for re-payment of the loan, were usurious transactions, and that the appellants are entitled to have the three sums thus paid credited upon the mortgage debt as of the times they were paid.

The order appealed from will be reversed with costs, and the cause remanded for further proceedings.

*Order reversed with costs, and  
cause remanded.*

(Decided 20th June, 1879.)

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GEORGE M. STONEBRAKER vs. HENRY F. ZOLLICKOFFER,  
and others.

*Construction of a Will—Equitable life estate—Contingent remainder—Vested remainder—Interest of Tenant for life in Timber and Fire-wood.*

A testator devised a farm to H. F. Z., in trust, (he being also sole executor of the will,) for the use and benefit of the testator's only son G. M. S.; provided, the latter would live on said farm and

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Stonebraker vs. Zollickoffer, et al.

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superintend its cultivation; but should he decline so to do, then the trustee should rent the farm as he might think best, and after paying all expenses, it should be optional with him whether to pay the balance of the proceeds to G. M. S., the son, or to divide it equally between the two daughters of the testator. And after bequests in trust to the two daughters of \$15,000 each, the testator proceeded to devise and bequeath to H. F. Z., as executor, or to his executors, administrators or assigns, *all the rest, residue and remainder* of his estate, real, personal and mixed, in trust, for the uses and purposes following, that is to say, that he, she or they should divide the said residue into three equal parts or shares, and that one of said shares should be distributed to, and held by, H. F. Z., his executors, &c., in trust for the sole use of the son, G. M. S., the trustee paying to the son, the rents and profits, upon his receipt only. And after making devises and bequests of the other two parts or shares of such residue in trust for the daughters, this provision followed: "And in case of the death of my son George, or any one or both of my said daughters, *leaving children*, then in trust as to the principal of said three parts or shares of the residue of my estate, and *also in trust as to the aforementioned farm*, and aforesaid sums of \$15,000, for the *child or children* of such deceased son or daughter, *share and share alike, their heirs*, executors, administrators and assigns, as tenants in common; and in case of the decease of any child or children of my deceased son or deceased daughter or daughters under age, his, her or their shares shall be divided, among his, her, or their brothers and sisters, if any there be; and in further trust, that if either of my said children should die *without leaving child or children*, then that the entire interest in my estate of the son or daughter thus dying without issue, shall become the property of my surviving child or children, and of the children of such child or children, as shall remain, their parents being dead," &c., the same to be divided *per stirpes* and not *per capita*, and all to be held in trust as before directed. G. M. S., the devisee, declined to live on the farm according to the wish of his father, but the trustee, in the exercise of his discretion, allowed the son to receive the rents and profits as sole devisee. Some months after the death of the testator, a storm of wind blew down a quantity of timber growing on the aforesaid farm, and the same was converted into cooper stuff and fire-wood, and sold by the trustee. On a bill filed by G. M. S., claiming the net proceeds of the sales made by the trustee, together with all interest which the same might have earned from the time it was received by him, or a reasonable time thereafter, it was  
HELD:

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*Stonebraker vs. Zollickoffer, et al.*

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- 1st. That the complainant took but an equitable life estate in the farm devised, subject to the condition and option therein mentioned; and if there were no children in being at the time of the devise, the devise to them operated by way of contingent remainder, which became vested upon the birth of the first child, subject to open and let in after-born children.
- 2nd. That to the extent of the amount of the net proceeds of sale realized for fire-wood, the complainant was entitled to the corpus of the fund, but as to the amount realized for the timber, he was entitled only to the interest during his life.

APPEAL from the Circuit Court for Washington County, in Equity.

Samuel Stonebraker died in January, 1873, leaving a will, executed on the 5th of July, 1867, the provisions of which, for the purposes of this case, are sufficiently set out in the opinion of the Circuit Court. By the will, a certain farm lying in Washington County, was devised to Henry F. Zollickoffer, in trust for the use and benefit of the testator's only son, George M. Stonebraker. In August, 1873, a storm of wind blew down a large quantity of timber growing on this farm, and the same was converted into cooper stuff and fire wood, and sold by the trustee. A bill of complaint was filed by George M. Stonebraker, claiming the net proceeds of the sales made by the trustee, together with all interest which the same might have earned from the time it was received by him, or a reasonable time thereafter. The trustee and the complainant's two sisters, together with their respective husbands, were made parties defendants. The trustee and John T. Foster, the husband of one of the complainant's sisters appeared and answered; the other defendants failing to appear, an interlocutory decree was passed, and a commission was issued and testimony taken thereunder.

After hearing, Judge ALVEY delivered the following opinion:

"This is an application on the part of George M. Stonebraker, to have applied to his use the proceeds of certain wood and timber, which became prostrate by storm, on a certain farm devised in trust by his father, the late Samuel Stonebraker, deceased. To determine the question as to the right of the plaintiff, it is made necessary to ascertain by construction of the testator's will, what estate George M. Stonebraker takes under the devise of the farm.

"The will is in many respects peculiar, and is very inartificially drawn. But I think there is no great difficulty in determining what estate the devisee takes in the farm devised. The evidence of the general intent pervading the whole will, as well as the particular terms employed in the devise, all seem to point to but one conclusion, and that is, that George M. Stonebraker takes no greater estate than for life.

"The devise of the farm is to Henry F. Zollickoffer, in trust, (he being also sole executor of the will,) for the use and benefit of the testator's son, George M. Stonebraker; provided the latter will live on said farm and superintend its cultivation; but if he declines so to do, then the trustee shall rent the farm as he may think best, and after paying all expenses, it shall be optional with him whether to pay the balance of the proceeds to the son, George M., or to divide it equally between the two daughters of the testator. And after bequests in trust to the two daughters of \$15,000 each, the testator proceeds to devise and bequeath to Zollickoffer, as executor, or to his executors, administrators or assigns, *all the rest, residue and remainder of his estate*, real, personal and mixed, in trust for the uses and purposes following, that is to say, that he, she or they shall divide the said residue into three equal parts or shares, and that one of said shares shall be distributed to and held by Zollickoffer, his executors, &c., in trust, for the sole use of the son, George M. Stonebraker, the trustee paying to him, the son, the rents and profits, upon his

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Stonebraker vs. Zollickoffer, et al.

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receipt only. And after making devises and bequests of the other two parts or shares of such residue in trust for the daughters, this provision follows: 'And in case of the death of my son George, or any one or both of my said daughters, *leaving children*, then in trust as to the principal of said three parts or shares of the residue of my estate, and *also in trust as to the aforementioned farm*, and aforesaid sums of \$15,000, for the *child or children* of such deceased son or daughter, *share and share alike, their heirs*, executors, administrators and assigns, *as tenants in common*; and in case of the decease of any child or children of my deceased son or deceased daughter or daughters, under age, his, her or their shares shall be divided among his, her or their brothers and sisters, if any there be; and in further trust, that if either of my said children should die *without leaving child or children*, then that the entire interest in my estate of the son or daughter thus dying without issue, shall become the property of my surviving child or children, and of the children of such child or children as shall remain, their parents being dead,' &c.; the same to be divided *per stirpes* and not *per capita*, and all to be held in trust as before directed.

"According to the statements, both in the bill of complaint and the answer of the trustee, George M. Stonebraker, the devisee, has declined to live on the farm, according to the wish of his father; but it appears that the trustee, in the exercise of his discretion, has allowed the son to receive the rents and profits as sole devisee.

"It is true, there is no express limitation of the estate in the farm to the son for life; but there is that which is equivalent to such limitation, in the terms employed to dispose of the estate both in the event of his dying leaving child or children, and of his dying without such child or children. In the former event the estate is devised to the child or children of the deceased son, to be equally shared among them, if more than one, their heirs and

assigns; and in the latter event, that is, of his dying without children, the estate is devised to the surviving child or children of the testator, and to the children of any child that may be dead.

“The only ground upon which it can be contended that the son takes a greater estate than for life in the farm devised, is by treating the words ‘child or children’ as words of limitation; but that construction is opposed both by the general rule of law and the manifest intention of the testator. The words ‘child or children’ are, as a general rule, and by legal presumption, taken to be words of purchase; and it is only in special and peculiar cases, where such construction is necessary to effectuate the manifest intention of the testator, that they will be taken as words of limitation, and construed to be equivalent to the words *issue or heirs of the body*. In *Wild’s Case*, 6 Co., 17, it was said, ‘that if A devise his lands to B, and to his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail; for the intent of the deviser is manifest and certain that his children or issue should take, and as *immediate* devisees they cannot take, because they are not *in rerum natura*; and by way of remainder they cannot take, for that was not his intention, for the *gift is immediate*; therefore such words shall be taken as words of limitation;’ but otherwise if B had children or issue at the time of the devise. This was not the ruling upon the state of case actually before the Court, but the principle announced has been accepted as a rule in the construction of wills, in certain special cases, in order to avoid disappointing the general scheme of the will. It has, however, met with but little favor, and been reluctantly applied, and some Courts have repudiated it altogether, because it requires an artificial and strained construction, inconsistent with the plain meaning of words. *Carr vs. Estill*, 16 B. Mon., 309.

“In case of *Buffar vs. Bradford*, 2 Atk., 220, the testator gave, in a certain event, a share in real and personal



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Stonebraker vs. Zollickoffer, et al.

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estate (as in this case,) to A and her children, and A having died in the testator's life-time, leaving a child, who was born after the will was made, when A had no child, it was contended, on the authority of *Wild's Case*, that the devise had lapsed; but Lord HARDWICKE was not of that opinion, and held that the child was entitled, and in the course of his opinion said: 'It must be allowed that children in their natural import are words of purchase, and not of limitation, unless it is to comply with the intention of the testator where the words cannot take effect in any other way.'

"It will be observed that the devise here is altogether different from that in Mrs. Hilleary's will, involved in the case of *Hilleary vs. Hilleary*, 26 Md., 275. There the devise was to T. H., all the testatrix's real estate, &c., 'to him and his children forever,' with a devise over in fee upon T. H. dying without leaving children or issue. T. H. died and never had children or issue, and the question being upon the validity of the devise over, the Court sustained the validity of that devise, and in passing said (though not necessary to the determination) that T. H. took a fee simple subject to the devise over. Here the devise is not to G. M. S., and his children; but being to the children upon the death of the first devisee, and therefore to succeed the life estate, with a devise over in the event of the first devisee dying without child or children, the reason for the rule, as we find it stated in *Wild's Case*, has no application whatever. If therefore, this were a devise to the first devisee, and after his death to his children, without anything more, it is clear, upon the authorities, that the first devisee would take but a life estate, with remainder to the children, who would take by way of purchase, and not by descent. And this is according to the principal rule laid down in *Wild's Case*. There the devise was to A for life, remainder to B and the heirs of his body, remainder to W and his wife, and after their decease, to their children, W and his wife then having issue,

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Stonebraker vs. Zollickoffer, et al.

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a son and daughter; and it was held, that W. and his wife had but an estate for life; and, on such a devise, although they might have had no child at the time of the devise, yet every child which they might have after, would take by way of remainder. Other and later authorities of the greatest weight are full and explicit to the same effect. *In re Sanders*, 4 Paige, 293; *Rogers vs. Rogers*, 3 Wend., 503; *Daniel vs. Whartenby*, 17 Wall., 639, 644.

“But the present case is infinitely stronger in support of the construction which gives but a life estate to the first devisee, than many to which reference could be made, where the words ‘child or children,’ after a devise to the parent, have been held to be words of purchase, and the first devisee took but a life estate. Here, superadded to the words ‘child or children,’ we have appropriate words both of limitation and distribution; the devise being to the child or children of such deceased son, share and share alike, their heirs, executors, administrators and assigns, as *tenants in common*. What effect, if any, is to be given to these words of distribution and limitation, following the gift to the children? In this State, it is settled that superadded words of limitation, even to the word ‘issue,’ which in case of a will is *prima facie* a word of limitation, will convert the word ‘issue’ into a word of purchase; that word, in such case, being synonymous with children. That has been recently decided by the Court of Appeals in the cases of *Shreve vs. Shreve*, 43 Md., 382, and *Timanus vs. Dugan*, 46 Md., 402. See also the case of *Daniel vs. Whartenby*, 17 Wall., 639, which fully supports the same proposition; and in addition to the authorities already cited, the cases of *Curtis vs. Longstreth*, 8 Wright, (Pa.) 297; *Perry vs. Louber*, 13 Wright, (Pa.) 483, and *Sisson vs. Seabuy*, 1 Sumn., 242, may be referred to as full to the point, that on a devise like the present, the first devisee takes but a life estate, with remainder to his children.

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Stonebraker *vs.* Zollickoffer, *et al.*

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"I conclude, therefore, that George M. Stonebraker takes but an equitable life estate in the farm devised, subject to the condition and option therein mentioned; and if there were no children in being at the time of the devise, the devise to them operated by way of contingent remainder, which became vested upon the birth of the first child, subject to open and let in after born children.

"Such being the right and estate of George M. Stonebraker, the plaintiff, the next question is, what interest has he in the fund produced by the sale of the timber and wood from the farm?

"Timber as such belongs to the inheritance. Tenant for life, unless he holds without impeachment of waste, (which is not the case here,) has no right to fell timber, except for necessary and proper repairs of the buildings and erections on the premises. And where timber has been blown down by wind, or severed by accidental cause, or has been cut down by a wrong-doer, it belongs to the party who has, at the time of severance, the first estate of inheritance. This was ruled in *Bowle's Case*, 11 Co., 79, and the principle has been acted upon in many subsequent cases. And where timber has been so severed, the fund arising from the sale of it, the Court will order to be invested for the benefit of the estate—that is, the inheritance; and, according to the later cases, though otherwise in some of the earlier ones, the tenant for life, though he may be subject to impeachment for waste, if free from blame in respect to the particular timber severed, will be allowed to receive the interest of the fund for life. This is the settled rule in case where the timber is cut by order of Court for the benefit of the estate; and it has been decided that the reason and justice of the rule equally apply to the case where the timber has been severed by tempest, accident, or trespass, if the tenant for life be without fault. *Tooker vs. Annesley*, 5 Sim., 235; *Waldo vs. Waldo*, 7 Sim., 261; *Bateman vs. Hotchkin*, 31 Beav.,

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Stonebraker vs. Zollickoffer, et al.

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486; *Bagot vs. Bagot*, 32 *Beav.*, 509. The tenant for life being entitled to the interest of the fund in the one case, it is difficult to perceive any good reason why he should not be entitled in the other; as in both cases he is equally deprived of the possible benefits that the trees might be to the use and enjoyment of his term, and that, too, without his fault.

“But though the tenant for life may not be entitled either to the timber or the corpus of the fund arising from its sale, yet he is entitled to the old trees which cannot be used as timber, and to the tops and branches of trees which have been felled for timber, and also to the regular thinnings and trimmings of the trees in the woods; and these he may convert into fire wood, or to any other use that he can make of them. *Herlakenden's Case*, (3rd *resol.*), 4 *Co.*, 62; *Channon vs. Patch*, 5 *B. & Cr.*, 897. Here, while the fund in question is alleged to have arisen from the sale of timber and wood, it is not alleged, nor shown in proof, what part of the fund was produced by the sale of timber, and what part from the sale of wood. Upon the supposition that nothing was converted into fire wood, that was valuable as timber, it will be necessary that the amount realized for the wood be separately ascertained; as to that extent the complainant is entitled to the corpus of the fund; but as to the amount realized for the timber, he is entitled only to the interest thereon during his life.

“Unless this ascertainment be made by agreement, I shall refer the case to the auditor to take an account, but if an agreement can be made to obviate the reference, I will then sign a decree in conformity to the principles of this opinion, with directions that the costs be paid out of the fund arising from the sale of the timber, as was done in the case of *Tooker vs. Annesley*, 5 *Sims.*, 235.”

To obviate the reference to the auditor, it was agreed by the parties through their respective counsel, that the sum

*Stonebraker vs. Zollickoffer, et al.*

of five dollars should be taken and considered as the value of the fire wood ; the Court (ALVEY, J.) thereupon adjudged that the complainant was entitled to five dollars, the value, as agreed upon, of so much of the trees as were converted into fire wood, and that the net amount of the proceeds of sale, after deducting the said sum of five dollars, should be held by the trustee, and the interest thereof paid annually to the complainant during his life-time, according to the discretion vested in such trustee by the will.

From this decree the complainant appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, GRASON and MILLER, J.

*Julian I. Alexander*, for the appellant.

The Circuit Court held that the children of the testator took equitable estates for life in the property devised, with remainder to their children, vested or contingent, as they had or had not children at the date of the will.

But the will in the first instance gives the farm, together with the two sums of \$15,000 each and the residue of the real and personal estate of the testator, to the son and daughters respectively, in absolute terms. The gifts are immediate, of the corpus of the fund or estate, are expressly for the use and benefit of the devisees, and are in terms which, under the Act of 1825, necessarily carry the whole interest.

The testator directs his residue to be divided into three equal parts or shares, and he then directs that the said parts or shares shall be distributed in the manner he directs: that is to say, he gives one of the three shares of his estate thus divided, to the trustee, in trust, to hold the same in and for the sole use of his son, paying the rents, issues, and profits to him and on his receipt only, and so of the other shares. The residue is blended of realty and personalty, and it surely could not be contended,

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Stonebraker *vs.* Zollickoffer, *et al.*

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if the will had stopped there, that the gifts were not absolute to the testator's children, but were for life only. The word "life" is not mentioned in the will, and had the testator intended to give only life estates, nothing would have been simpler for him than to give estates to his children for their lives, with remainder to their children. If, then, this will had stopped there, the children of the testator would have taken their respective shares absolutely, and might have disposed of them as they saw fit.

Then follows the clause which creates the difficulty: "In case of the death of my son George, or any one or both of my said daughters, leaving children, in trust" for those children, their heirs, &c., "in case of the decease of any child or children of my deceased son or deceased daughter or daughters, *under age*, his, her, or their shares shall be divided among his, her, or their brothers or sisters, if any there be; and \* \* \* if either of my said children should die without leaving child or children, then that the *entire interest in my estate* of the son or daughter thus dying without issue, shall become the property of my surviving child or children, and of the children of such child or children as shall remain, their parents being dead."

Now, if this clause be meant to restrain the gifts to the testator's children, it of course disables them from dealing with their shares, to the injury of their children, if any; or if none, to the injury of the survivors. And if there be no issue of any of them, the survivor will take the whole, and thus the several gifts to each will be converted into a joint tenancy.

The farm is given to George in terms that would be absolute if the will went no further. If he dies leaving children, it is to go to the children. If he dies without issue, leaving his sisters surviving him, the farm goes to them. But if he survives his sisters, and dies without issue, then he takes the farm absolutely, for there is no

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Stonebraker vs. Zollickoffer, et al.

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gift over from him in that event. It may be remarked also, that if he dies leaving one child, who dies under twenty-one, that child takes absolutely. If he dies leaving two children, one of whom marries, has issue, and dies under twenty-one, leaving the other surviving, who also dies under twenty-one, nevertheless the latter takes the whole by survivorship. And if all his children die in his life-time, and he survives the testator's two daughters, he takes absolutely; the rule being that if the gift to children is introduced by words importing the contingency, as "in case A. B. shall leave any child or children, to his children, and if he shall die without leaving children," which is the case here, the word "leaving" has its natural sense of leaving children at the period of his death. *Bythesea vs. Bythesea*, 23 L. J. Ch., 1004, is the principal authority on this point. No words and no intention are apparent on the face of the will, to cut down the estates given to the children to life estates in every event. On the contrary, it seems to be plain that they were to be entitled to the fee in certain events; and if this is so, then the utmost construction against the children would be that the gifts were to them in fee, defeasible as to the share of each, by either dying without children in the life-time of the others or other, in which case it would go to the others or other: but if either left children, such children would take their parent's share, defeasible if more than one, by dying under twenty-one, except as to the survivor.

The farm is, in the first place, a gift to George, and in case of his death, leaving children, to those children, their heirs, &c., as tenants in common; but if he dies without leaving children, then over. The gift over is to take effect either in case he should die leaving children, or in case he should die not leaving children. But he must of necessity die either leaving or not leaving children, and consequently the case is the same as if the gift over had been in the case of death *simpliciter*, which is the first category

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Stonebraker vs. Zollickoffer, et al.

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in the well-known case of *Edwards vs. Edwards*, 15 *Beav.*; 357; See *Dorsey vs. Dorsey*, 9 *Md.*, 40; *Clayton vs. Lowe*, 5 *B. & A.*, 636; *Gee vs. Mayor of Manchester*, 17 *Q. B.*, 737; *Slade vs. Milner*, 4 *Madd.*, 144; *Woodburne vs. Woodburne*, 23 *L. J. Ch.*, 326; *Rogers vs. Rogers*, 7 *Weekly Rep.*, 541; *O'Mahoney vs. Burdett*, *L. R.*, 7 *H. L.*, 396; *Hammett vs. Hammett*, 43 *Md.*, 307.

These cases show that the gifts over in cases of wills like the present one are to be considered as substitutionary, and as depending on the death of some of the devisees in the testator's life-time.

But besides, the gifts here are to the "executor." The only period of "distribution" mentioned in the will is the testator's death, for he directs that the shares of his residue "so divided shall be distributed," &c., at his death. And his death is, therefore, expressly declared to be the period of distribution.

Further, he says "if either of my said children should die without leaving child or children, then that the *entire interest in my estate* of the son or daughter thus dying, &c., *shall become the property* of my surviving child or children," &c. Thus the *property* taken by the survivors is the *interest* of the child dying, in the testator's estate, and the gift over is equipollent with the first gift to the children. But the gift over is conceded to be of the absolute estate. Therefore, the first gift must be absolute, and what is there in the will to cut down the natural force of the words "*entire interest in my estate*," used by the testator?

The words are not "part" or "share" or the like, but "interest," which "*ex vi termini*," says Lord COKE, *Co. Litt.*, 345 b, "in legal understanding extendeth to estates, rights, and titles that a man hath of, in, to, or out of lands; for he is truly said to have an interest in them, and by the grant of *totum interesse suum* in such lands, as well reversions as possessions in fee simple, shall passe,



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Stonebraker *vs.* Zollickoffer, *et al.*

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And all these words singularly spoken are *nomina collectiva*; for by the grant of *totum suum statum* in lands, all his estates therein shall passe."

The survivors here are to take the entire interest in his estate of the child dying; on the supposition that that child is to take for life only, the survivors are therefore to take for the life of their deceased brother or sister, which is absurd. Moreover, from the residuary share of each are to be deducted whatever book accounts or notes he may have against each at his death, which shows two things: first, that the *interest* of each was to be ascertained at his death; and next, that they were to pay their debts to him out of an absolute sum or property given to them.

*Hy. Kyd Douglas*, for the appellees.

The estate devised to Dr. Zollickoffer is an active executory trust, vesting the legal estate in him, and in cases of this kind the rule in *Shelley's Case* has no application. *Ware vs. Richardson*, 3 *Md.*, 505.

And at any rate, if hereafter the legal estate should vest in the children or heirs of the appellant, there is now but an equitable estate in him, and the two estates cannot coalesce. *Shreve vs. Shreve*, 43, *Md.*, 394.

Is there anything in the language of the will which will permit us by construction to enlarge the estate of the appellant, beyond an estate for life, by implication? Estates are only enlarged by implication in cases where the testator has left it uncertain what estate he intended to give; and as said in *Shreve vs. Shreve*—"where there is an estate for life given in express terms to one party, with a limitation of the fee to others, there is no room for the doctrine."

If this were a devise directly to the appellant, and after his death to his issue, if he leave any, and if not, to his sisters, even then the word "issue" would be construed to mean *children*, and there being other words of limi-

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Stonebraker vs. Zollickoffer, *et al.*

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tation superadded, the word *issue* would be held to be a word of purchase, (that is, the stock as fixed by the will itself, from which the subsequent inheritance should proceed,) and the estate of the appellant, the first taker, would be only for life. But here the word "children" is used in the will, and in case of the death of the appellant, the property is to go to his "child or children," if any, "share and share alike, their heirs, &c., as *tenants in common*,"—superadded words of limitation fixing the stock of inheritance in the grandchildren as purchasers, and very similar to the case of *Findlay vs. Riddle*, 3 *Binney*, 156, and the case put in *Horne vs. Lyle*, 4 *H. & J.*, 435.

The main question presented by this case has been recently decided by this Court and also by the Supreme Court of the United States. *Shreve vs. Shreve*, 43 *Md.*, 383; *Timanus vs. Dugan*, 46 *Md.*, 402; *Daniel vs. Whartenby*, 17 *Wal.*, 639.

The timber while standing is of course part of the estate; when cut or blown down, it is part of the inheritance. If the life tenant is entitled to any portion of it, when sold and invested, it is only the interest of the sum invested. *Waldo vs. Waldo*, 7 *Sim.*, 261.

It is contended by the appellant that the phrase in Stonebraker's will, viz., "*In case of the death of my son George or any or both of my said daughters*"—must be construed by the Court to mean the death of George in the life-time of the testator; and that as George survived the testator, George takes the farm and the other legacies *in fee*, and not a life estate therein.

But it is submitted that it has been determined in many cases, that the Courts will only adopt such a construction either where it is in accordance with the testator's intention, or where the will is so incongruous and ambiguous as not to be capable of any other construction. In this case the intention of the testator is apparent all through

Stonebraker vs. Zollickoffer, et al.

the will, and the construction contended for by the appellant would only violate that intention. *Dorsey vs. Dorsey*, 9 Md., 40; *Hill vs. Hill*, 5 G. & J., 87; *Hammett vs. Hammett*, 43 Md., 307; *Horne vs. Pillans*, 2 M. & K., 15; 2 *Jarman on Wills*, 661, et seq.; 1 *Roper on Legacies*, 613, et seq.; *Douglas vs. Chalmers*, 2 Ves., 500.

If the Court should be of opinion as contended for by the appellee, that the language of the will gives George a life estate, then there is no room for the position taken by the appellant. 2 *Jarman on Wills*, 666; 1 *Roper on Legacies*, 613; *Rogers vs. Rogers*, 7 *Weekly Reporter*, 541; *De Costa vs. Keir*, 3 Russ., 360. When as in this case, this legatee is only to get the rents, profits or interest, the appellant's rule of construction cannot apply. 2 *Jarman on Wills*, 666; *Tilson vs. Jones*, 1 Russ. & M., 553.

BARTOL, C. J., delivered the opinion of the Court.

The question in this case arises upon the construction of the will of Samuel Stonebraker. The appellant, son of the testator, claims the proceeds arising from the sale of certain timber, which had been prostrated by a storm on a farm devised by the will.

It is conceded in the argument that the right of the appellant depends entirely upon the question, whether his interest and estate under the will is in fee or for life only.

Our brother ALVEY sitting in the Circuit Court, decided that the appellant took under the will an equitable estate in the farm, for his life only: and we entirely concur in this conclusion.

The decision of the case may very well be rested upon the reasoning contained in the opinion of Judge ALVEY and the authorities therein cited.

The will does not in express terms limit the estate devised to the appellant, to his life only, and hence it is argued that under the Code, Art. 93, sec. 305, (Act of 1825, ch. 119,) he takes the absolute estate in fee.

There being no words of perpetuity, the devisee would at the common law, take a life estate.

The Code provides that a devise without words of perpetuity or limitation shall operate to pass the entire and absolute estate, "unless *it* shall appear by devise over or by words of limitation or otherwise, that the testator intended to devise a less estate and interest."

In the will under consideration, we think the intent to limit the estate of the appellant to his life, clearly appears from the terms employed; whereby the estate is disposed of after the death of the appellant, both in the event of his dying leaving a child or children, and of his dying without leaving child or children. In the former contingency the gift is to the child or children of the appellant, "to be equally shared among them if more than one, their heirs and assigns; and in the latter event, that is of his dying without children, the estate is devised to the surviving child or children of the testator, and to the children of any child who may be dead."

The position that the devise over to the *children* of the first devisee enlarges his estate by the operation of the "Rule in *Shelly's Case*" is altogether untenable, because it is well settled that the word children is not to be construed as a word of limitation, unless such clearly appears to be the intent of the testator, and in this will no such intent appears. We need refer on this point to no other authorities except those cited in the opinion of the learned Judge by whom this case was decided below. From these authorities it is clear that the "Rule in *Shelly's Case*" has no application to the will before us. And we do not understand the appellant's solicitor as so contending.

The ground upon which they seek to maintain that the appellant takes the absolute estate in the farm devised, is that the limitation over in the event of his death is to be construed as referring only to the contingency of his death happening during the life-time of the testator, and

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Stonebraker vs. Zollickoffer, et al.

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many authorities have been cited by them to show that if the will be so construed, then the devise to the children becomes a substitutionary devise, and the first devisee, if he survives the testator takes an absolute estate.

We have examined the cases cited in argument, and are of opinion that they do not support the construction of this will, for which the appellant contends. It appears to us to be quite plain from the terms of the will, that the contingency upon which the limitation over is to take effect, refers not to the death of the first devisee during the life of the testator, but to his death whenever it may occur at a subsequent time. The contingency is not simply the death of the devisee, but his leaving children or not leaving children at the time of his death. The effect of this construction is to limit the estate of the first devisee to the term of his life.

We refer to the decision of Sir J. LEACH, V. C., in *Allen vs. Farthing*, stated in 2 *Madd.*, 310, and more fully reported in 2 *Jarman*, 168 m. That case is very analogous to this. The will there under consideration was, in its provisions, almost identical with the will before us, and the decision of the Vice-Chancellor appears to us to be consistent with reason and authority, and quite conclusive of the present case.

We refer also to *Child vs. Giblett*, 3 *Mylne & Keen*, 71, which was a decision to the same effect by the same learned Judge while Master of the Rolls.

Many other cases might be cited in support of this construction of the will, but we think it is plain from the words of the will itself.

It follows that in our opinion, the decree of the Circuit Court ought to be affirmed.

Upon the question as to the right to the timber, we have said that it has been conceded on the part of the appellant, that if his estate under the will, is a life estate only, he is not entitled thereto.

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Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

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This branch of the case is rested upon the opinion of the Judge sitting in the Circuit Court, and need not be further discussed.

*Affirmed and remanded.*

(Decided 20th June, 1879.)

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GEORGE E. SANGSTON, and ELIZABETH C. SANGSTON and MARY E. SANGSTON, Administratrices of LAWRENCE SANGSTON, deceased *vs.* OLIVER F. HACK and ANNIE H. HACK, his Wife, and others. OLIVER F. HACK and ANNIE H. HACK, his Wife, and others *vs.* GEORGE E. SANGSTON, and ELIZABETH C. SANGSTON and MARY E. SANGSTON, Administratrices of LAWRENCE SANGSTON, deceased.

*What amounts to an Acceptance of Trusts created by a Will—Lapse of time and Laches—Trustees and Cestuis que trust—Continuation of a Partnership after the Time limited by the Articles—Percentage of profits as compensation to a Clerk does not constitute him a Partner—Act which did not prevent the continued operation of Articles of Partnership—Proper basis under the circumstances of the case, for the Statement of an Account as between the Beneficiaries under the Will of a deceased Partner and the Surviving partners—When compensation will be allowed Surviving partners for winding up the Partnership—Obligation of a Partner who fails to comply with his Agreement to furnish Capital, to share proportionately with his Co-partners in the loss of Capital—When surviving Partners are incompetent to Testify in their own behalf.*

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

Where the same parties are executors and trustees under a will, the fact that they take out letters of administration as executors, amounts to an acceptance of the trusts created and imposed upon them by the will.

Mere lapse of time and laches are not an absolute bar to an account, as between such trustees and the *cestuis que trust*, under the express trusts created by the will.

If a partnership under Articles, for a definite time, is silently continued after that time, the Articles will continue in force as between the partners, except so far as the firm in the after conduct of its business, varies or departs from them, or appears to adopt new ones.

Three brothers, who had entered into a partnership under Articles, for a definite time, agreed in writing, endorsed on the Articles, to continue the partnership for two years, "subject to a charge of twelve *per cent.* of the net profits" to a former clerk, "in lieu of the salary heretofore allowed him." **HELD:**

1st. That this did not make the clerk a partner, for where a percentage of profits is adopted simply as a mode of measuring the amount of wages, salary or remuneration, the fact that it is made contingent upon profits does not create a partnership.

2nd. That assuming, that he was a partner, and so continued for the two years, his withdrawal at the end of that time did not prevent the continued operation of the Articles as between the three brothers, who afterwards continued the business of the firm.

One of the brothers died in April, 1851, leaving a will, and in August of that year, the two survivors formed a new partnership under the same name, and continued the business for three years when they failed. More than eighteen years after the testator's death, a bill was filed by his children and grand children, beneficiaries under his will, against the surviving partners for an account. **HELD:**

That under the peculiar circumstances of the case (which are pointed out in the opinion of this Court) the Court below was right in directing the account to be stated from the Cash book and Ledger of the old firm, the only ones still extant, the others after being preserved for a long time, having been sold for waste paper.

No compensation can be allowed surviving partners for winding up the partnership, unless so *stipulated* in the partnership Articles; but

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*Sangston. et al., Adm'ces vs. Hack and Wife, et al.*

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when such stipulation is made, it must be carried out, and compensation allowed.

Where each partner agrees to contribute a certain sum of money as capital, and the enterprise proves a failure, the partner who has brought in nothing, must make good to his co-partners the proportionate share he agreed to furnish.

Upon a bill for an account by the representatives of a deceased partner against the surviving partners, the latter are not competent witnesses in their own behalf.

CROSS-APPEALS from the Circuit Court of Baltimore City.

The bill of complaint in this case was filed on the 16th of June, 1869, by Oliver F. Hack and Annie H. Hack, his wife, daughter of James A. Sangston, deceased, Annie E. Hack infant daughter of the said Oliver and Annie, James E. Sangston, son of the deceased James A. Sangston and Laura E. S. Sangston and others, infant children of the said James E. Sangston, against George E. Sangston and Lawrence Sangston. The object of the bill was to obtain an account of the estate of the deceased James A. Sangston, from the defendants who were his surviving partners, executors and devisees in trust, and for other purposes. The defendants answered the bill. Other proceedings were had. Lawrence Sangston having died, his widow and daughter, as his administratrices, were substituted in his place. Finally on the 19th of July, 1878, the Court, (GILMOR, J.,) decreed that there was due to the partnership of Sangston & Co. by Lawrence Sangston, deceased, the sum of \$27,260.19, with interest from the date of the decree; and that by the said partnership there was due to the trust estate of James A. Sangston, deceased, the sum of \$24,672.19, with like interest, and to George E. Sangston the sum of \$9077.25, with like interest, and that for the payment of said sums in their due proportions, the assets of said partnership remaining, and which



Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

were particularly specified, should be sold, and the proceeds brought into Court to be so applied. Trustees were appointed to make such sale. Other provisions of the decree it is not deemed necessary to set out. From this decree, as also from the previous order of the 7th May, 1878, sending the case to the auditor to state an account in conformity with the views expressed in the opinion of the Court directing such reference, both sides appealed.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J.

*Geo. Hawkins Williams*, for the complainants.

By the death of James A. Sangston, the partnership of which he was a member, was dissolved. If, by implication, the old partnership was supposed to continue, notwithstanding it had expired in the three years by express limitation, and notwithstanding the intermediate existence of the new and distinct partnership with another man—Pollard—which had been substituted and intervened; yet, by the terms of his (Sangston's) will, his capital was to be a loan, "dating from his decease," "for the convenience of that firm," and "not as a continuation of my interest therein," *with no right to profits, nor liability for losses.*

George E. and Lawrence having accepted the office of executors of the will, and all the trusts thereunder, are bound by every line of it; they cannot take anything under a will and dispute anything in it.

The partnership, therefore, in law and fact, was dissolved on 18th April, 1851, the day of James A. Sangston's death.

Accepting the trusts of the will, George and Lawrence became express trustees in three different capacities—as surviving partners, executors, and devisees in trust.

Sangston *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

The *cestuis que trust*, or the beneficiaries of the great bulk of the estate, were infants and a married woman.

As trustees, George and Lawrence Sangston were then bound to keep correct accounts, clear, distinct and accurate—and if they did not, all presumptions, all obscurities and doubts are to be taken adversely to them. 2 *Perry on Trusts*, sec. 821; *Blauvelt vs. Ackerman*, 23 N. J., *Equity*, 495; *Bevans vs. Sullivan*, 4 *Gill*, 391.

And if the firm really became insolvent from losses, the same should be specified and the names given of those by whom the same accrued, so that the truth or falsehood of such statements, and the amount of such pretended losses could be verified by evidence competent in law.

The complainants are entitled to one-third of all sales of real and leasehold estate standing in the joint names at the price it sold for. To all that the parcels standing in James A. Sangston's name sold for, and to a lien on the warehouse on Baltimore street and the lot on Edwards street; also, to one-third of the value of the stock on hand, and debts recovered, less debts due by the old firm, which defendants shall prove were specifically due by said old firm, and by them actually paid, and a reference to the auditor to ascertain, as far as practicable, such amounts, and if not practicable, then to be stated with all presumptions against those whose conduct makes it impracticable.

The partnership, the Articles of which have been given in evidence, came to an end *absolutely* when the new one was formed, of which Pollard became a member. An incoming new partner makes a new partnership, and is in no sense a continuation of the old. *Story on Partnership*, sec. 307; *Abat vs. Penny*, 19 *Louisiana Ann. Rep.*, 289; *White vs. White*, 5 *Gill*, 377.

When, therefore, Pollard, after two years, went out, the three brothers again *de novo* associated themselves, and commenced a new partnership business by parol. In the

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

absence of any proof of the terms; the law settles the terms. You cannot bridge the "hiatus" and import into it, as the terms, some few of those of a theretofore existing partnership; for so doing there is no warrant in law, and in this case none in fact.

Lawrence Sangston claims *new* terms; he insists that in the new partnership, he was to be what he was not in the former—an equal partner. Then if the terms are in any respect new, what authority or justification can there be in adhering to the old terms as to all else?

In the absence of proof such implications are monstrous, and since the case of *McKaig, et al., Trustees vs. Hebb & Brengle*, 42 Md., 231, it cannot now be urged that George E. and Lawrence Sangston are competent witnesses for the purposes for which they volunteered and came forward.

The Articles, therefore, of the old, defunct partnership expired with it by limitation in 1846, and were "*functi officio*."

Lawrence Sangston cannot resort to them in part, swell his interest from a fourth to a third, and then comply with nothing else in them.

Were the original partnership books in *esse*, they would not be evidence, unless James A. Sangston, ill and dying in Florida, had had ample opportunity to examine them, against him nor those claiming under him. *Taylor on Evidence*, sec. 786.

And in no event are they evidence, save up to the *close* of the partnership. If credits are claimed for anything subsequent, then *strict proof* is required. *Bevans vs. Sullivan*, 4 Gill, 391.

If this firm ended on the day of James A. Sangston's death, or at any other time, by his will they had a loan of his capital, but they had no right to take the stock at a valuation, nor in any other manner than by a sale. *Parsons on Partnership*, 446; *Lindley on Partnership*, (marg.) 868; *Crayshaw vs. Collins*, 15 Vesey, 227; *Featherstonhaugh vs. Fenwick*, 17 Vesey, 309.

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

The law discountenances all allowances to partners for their trouble in settling up their affairs, and only allows it under special agreement. *Whittle vs. McFarlane*, 1 *Knapp P. C. Cases*, 312; *Bradford vs. Kimberly*, 3 *Johns. Ch. Rep.*, 431; *Beatty vs. Wray*, 19 *Penna.*, 516; *Bevans vs. Sullivan*, 4 *Gill*, 394. But even if commissions be agreed upon under special agreement, they are disallowed where there are no regular accounts or vouchers. *Story's Equity*, sec. 468; *White vs. Lady Lincoln*, 8 *Vesey*, 363; *Lupton vs. White*, 15 *Vesey*, 441. For a mere questionable manner in keeping accounts they were disallowed in *Blauvelt vs. Ackerman*, 23 *N. S. Equity*, 504.

In this case the Articles of an old defunct partnership, even if by implication imported into the new firm, only allow a compensation to survivors "for closing the business."

Upon a decree for an account, answer no evidence of disbursements. *Boardman vs. Jackson*, 2 *Ball & B.*, 382; *Gibson vs. McCormick*, 10 *G. & J.*, 65; *McNeal vs. Glenn*, 4 *Md.*, 97.

The accounts furnished are admissible as evidence against them, and using them is no admission of their correctness; they must prove the credits they claim. *Morehouse vs. Newton*, 3 *De Gex & Sm.*, 307.

As to limitations and *laches*, these do not apply to express trusts, nor can married women and infants be guilty of them to their trustees. Besides, they are not construed so strictly to apply between relatives. 2 *Story's Equity*, sec. 1520, *d.* And there can be no acquiescence ever without knowledge. *Pairo vs. Vickery*, 37 *Md.*, 486.

*Bernard Carter and I. Nevett Steele*, for the respondents.

George E. and Lawrence Sangston, as surviving partners of the firm of Sangston & Co., No. 1, (of which firm James A. Sangston was the other member,) are entitled

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

to commissions by way of compensation for their services in winding up the business of said firm, upon its dissolution in August, 1851, by the death in April, 1851, of James A. Sangston. This the complainants, as the representatives of James A. Sangston deny.

This claim of respondents Judge PINKNEY (who sat during all the proceedings in the case, except when the case was last heard,) *allowed*. See *Story on Part.*, sec. 279; *Lindley on Part.*, 697; *Parsons on Part.*, 239; *United States Bank vs. Binney*, 5 *Mason C. C. Reps.*, 176, 185; *Bradley vs. Chamberlin*, 16 *Verm.*, 613.

The claim was rejected by Judge GILMOR.

The amount allowed, was \$30,770.35; yet of this, only \$14,378.67 was principal, the other \$16,392.08 being interest from March 1st, 1853, to March 1st, 1872, the date of stating the account.

But it is to be remembered that interest is charged *against* respondents in all the other schedules and accounts stated by the auditor, on all moneys received by them; so that in considering the question of this compensation we are really only to consider the *principal* of the amount allowed, which is only \$14,378.67, as if interest is to be struck off when allowed *to us*, it must be when allowed *against us*. The \$14,378.67 is arrived at by allowing five per cent. on \$287,573.61, which was the amount of the indebtedness of the old firm paid by respondents.

This sum of five per cent. was allowed on the amount of the indebtedness of the firm of Sangston & Co., *all of which* was paid by Geo. E. and Lawrence, and to pay which they had expended *of their own money*, up to August 1st, 1854, \$47,180.60, and on which account though somewhat reduced by subsequent collections, there is still due to them, as of March, 1872, \$41,614.76.

That this is a reasonable amount is proved by three intelligent merchants. The complainants offered no evidence that the amount named was unreasonable.

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Sangston, *et al.*. Adm'ces *vs.* Hack and Wife, *et al.*

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Are the respondents entitled to compensation?

Their right to it rests upon the express provisions of the Articles of partnership. Having provided that the rate should be fixed by three disinterested persons, the respondents asked the Court to appoint these, but it appears the Court declined to do so, and accordingly the respondents asked three disinterested merchants, to fix what in their judgment was fair, and they did so. But even if this ascertainment is not binding as made, yet being declared by them to be a fair award, this, in the absence of all evidence to the contrary, is sufficient.

Though there is no *written* evidence binding on James A. Sangston, that the original Articles of August 1st, 1843, were continued in force longer than August 1st, 1848, yet, as the partnership was continued without interruption after that period, and was in existence when James died, without any evidence of any change in the Articles, they are to be considered in force.

The firm of Sangston & Co. was *insolvent* as far back as 1848, though the Sangstons did not know it.

The surviving partners paid all its debts, and the books show it to have been insolvent, because George E. and Lawrence, after applying all the assets to the debts, had to expend over \$47,000 of their own money. There is not a particle of evidence that the failure to make its assets pay its debts was owing to mismanagement. There is not any evidence that a single dollar of the funds of the firm was misappropriated.

The stock of the firm was taken by the surviving partners at an appraisement made by intelligent merchants. The amount allowed was a very liberal one.

Was the sum of \$41,614.76, allowed to respondents, correctly allowed to them? This is the amount, with interest, which appears from the books of Sangston & Co., No. 2, to be the balance due to respondents, for debts of said firm paid by them after the dissolution of said

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

firm. It was allowed by both of the Judges in passing on their accounts.

The opinion accompanying the decree of the 15th of January, 1872, for account expressly required the accounts to be taken from the books of the partnership.

The Court was clearly correct in saying the *laches* of the complainants had closed their mouths to object to these books.

In 1854, when they filed their petition to the Orphans' Court, when all the books were in existence, and all witnesses who made the entries were alive, the respondents offered every opportunity for full examination. The books were actually examined by James E. Sangston, one of the complainants, the son of James A., who had kept them in part.

The entries are also affirmatively shown to be correct by Lawrence Sangston and George E. Sangston.

What books (being only the Day-book and Journal,) are not in existence, are shown to have been sold long after the respondents had reason to suppose that there was no pretence that there was to be any further claim made against them, having by their answer in the Orphans' Court, in 1854, declared that there was nothing due to the complainants, and no claim being ever afterwards made till the books had been sold.

But the books *preserved* contained every entry for the making of the account, that is, the Ledger and Cash-book. The only purpose the others would have served would have been to give more *detailed* items.

But even if the books were thrown out, and we could only claim such debts as we could prove *aliunde* that we paid, we have proved enough to make in our favor a still larger indebtedness.

It appeared by schedule 10, and as brought down to a later period, September 1st, 1875, by schedule 10 $\frac{1}{2}$ , that there is due to respondents, called in these schedules

Sangston. *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

"Sangston & Co., No. 2," a balance of \$43,687.79, by the old firm of Sangston & Co., called Sangston & Co., No. 1.

This balance is obtained by crediting respondents with the \$41,614.76, due for debts of said firm paid by them, and with the \$30,770.35, on account of commissions, and charging them with all moneys received by them for the partnership assets, including the rents, &c. of the Baltimore street warehouse, and interest on all such sums.

We thus have the firm of Sangston & Co., No. 1, indebted to the respondents in the sum of \$43,687.79, as of September 1st, 1875. The amount would be of course subject to change now, owing to receipts of rents since on the one side, and interest chargeable on the other side.

The firm of Sangston & Co., No. 1, (the old firm, of which James A. Sangston was a partner) being insolvent to this amount, and being *indebted* in this amount to the respondents, the *assets* of the firm are to be applied in the first instance to the payment of this indebtedness, and is not to be applied to the returning of the partners their *capital*.

The only *existing assets* of the partnership at this time (independent of any debt due by any partner to the concern) are the Baltimore street warehouse, and a small house on Edward street, which was taken in payment of a debt due to the partnership.

No proper and complete partnership accounts can be stated until these assets have been reduced to *money*, so that their real value can be known. There is *no debt* due by said firm ("Sangston & Co., No.1,") to any one, except the aforesaid debt to respondents.

The broad controlling principle which should regulate the mode of stating the accounts in this, as in all partnership cases, is that the assets of the firm are to be applied in the first instance to the payment of the debts of the firm; and no account as between the partners is to be taken till this shall have been done.



Sangston, *et al.*, Adm'ees *vs.* Hack and Wife, *et al.*

Guided by this principle, we contend that the existing assets are to be appropriated to the debt due to the respondents, and when they shall have been so applied, and the balance which will remain unsatisfied from this source ascertained, that then the amount in which each partner may be found to be indebted to the firm for sums drawn in excess of his share, is to be ascertained and made applicable to pay said balance due to respondents. *Story on Partnership*, 348, (A.) Nor until the debts are paid can any of the assets be applied to returning to the partners the capital advanced by them. See 1 *Lindley on Part.*, 790, 791, 798, 807, 827; *Story on Part.*, 348, (a); *Wood vs. Scoles*, 1 *Chancery Appeal Cases*, 369.

Guided by this principle, it is plain that the assets, (the Baltimore street and Edward street houses,) must be sold, and their proceeds applied, in the first place, to the payment of the \$43,687.79, or whatever shall be the exact amount as found at the date of the decree to be due to respondents on the account aforesaid.

The auditor, instead of proceeding on this principle, in his schedules subsequent to 10½, has treated the partners as entitled to have their *capital* re-paid to them, *pari passu* with the payment of the \$43,687.79 *advanced* by respondents.

The consequence of this mode of dealing with the accounts is, that by the final schedule, (15½) Lawrence Sangston, who is shown by schedule 10½ to be a *creditor* to amount of half of \$43,687.79, (\$21,843.89,) not only gets none of this, but is actually made to *owe* the concern, \$24,308.00; while George Sangston, his co-respondent, who contributed no more of the \$41,614.76 advanced by them jointly to pay the debts of the firm, than did Lawrence, and was entitled to no more of the \$30,770 allowed for commissions, instead of being made to *owe* the concern, has \$12,029 carried to his *credit* in schedule 15½. And James A. Sangston, who earned no commissions, and

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

advanced nothing to pay the debts of the firm, gets \$12,239 carried to his credit. Certainly such a result is its own refutation. By this mode of stating the accounts, we have two partners in an *insolvent* concern, getting back, on account of their capital, over \$12,000 each, and leaving the debts unpaid, and bringing the partner who paid the debts in debt to them, in the aggregate as much as they get awarded to them.

There is another very grave error in the principle on which the schedules containing the statement of the capital accounts are made up. The error consists in allowing interest on the amount of capital found credited on the books of Sangston & Co., No. 1, to the two partners, James A. Sangston and George E. Sangston.

Interest is allowed for 19 years, 28 days prior to March 1st, 1872, that is from February 1st, 1853, making an aggregate of \$54,132.61 allowance for *interest* on capital found credited on the books to these two partners.

If this item of \$54,132.61, allowed for interest on capital stock be struck out, a difference will be made in the result of the accounts. If we look at schedule No. 16, as ratified by the Court, it will be seen that James A. Sangston's account is credited with \$61,363.76 on capital account; whereas, without interest, it would only be one-half of \$47,298.61, or \$23,649.30, thus showing a difference in his credit of \$37,716.66; this (although his debits would not be so large either, if the correction as to interest be made,) would entirely wipe out the whole amount decreed to be due his estate. The same consequence would result to George E. Sangston.

It will thus be seen that the decree against the estate of Lawrence Sangston would have been largely in his favor, if interest had not been allowed upon the alleged capital of James A. Sangston and George E. Sangston from the year 1854. This allowance of interest was not a matter of right, but was to be made, if at all, only in

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

case the Court, upon consideration of all the equities of the case, decreed it just and proper. Such allowance is not equitable in this case, or justified by the facts. The defendants have had no balance of money in their hands; they have been guilty of no fraud, but honestly settled up the partnership affairs; those affairs, to say the least of it, difficult, and of doubtful result; and, under these circumstances, the adult complainants, who are entitled to the interest, if it be allowed, were guilty of gross laches in not taking steps to obtain an authoritative ascertainment of their rights.

It is believed no case can be found, in which, under such circumstances, a Court of Equity has allowed interest upon the capital of a partner. Certainly, it would seem, that if allowed at all prior to the actual settlement of the account, it should not be allowed before the filing of the bill. 1 *Lindley on Part.*, 807, *et seq.*; *Watney vs. Wells*, 2 *Chan. Appeals, L. R.*, 250; *Gyger's Appeal*, 62 *Penn.*, 80; *Bowling vs. Dobyn*, 4 *Dana*, 438; *Passenger Railway vs. Sewell*, 37 *Md.*, 452; *Trump vs. Baltzell*, 3 *Md.*, 295; *Raynor vs. Bryson*, 29 *Md.*, 473; *Gott vs. State, use of Barnard*, 44 *Md.*, 320, 321; ——— *vs. Loughborough*, 8 *Chan. Appeals, L. R.* 1; *In re The German Mining Co.*, 19 *Eng. L. & Eq.*, 591.

By the true construction of the Articles of partnership, the capital of James and George was, as between the partners, to be exhausted before there was to be any division of losses among the parties personally; and it was no part of the design of said Articles that Lawrence should be held to contribute to make good this capital. He does not stipulate positively to put in any capital, but only such as he might be able to get together from the assets of the firm of Sangston, Whiteley & Co., of which he had been a member. It does not appear anywhere that he ever realized anything from this source, and was therefore in no way in default.

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

It appears from schedule No. 6, that James A. Sangston's estate owes to the firm \$5247.91 up to March 1st, 1872, (more since, on account of interest,) for moneys paid to the complainants by the respondents since the death of James. These sums were paid for their support, at a time when it was supposed that the affairs of the firm would wind up differently. This sum is therefore applicable to pay Lawrence and George any deficiency that may exist in the amount due to them as creditors of the estate, after the application of the proceeds of the sale of the property now constituting partnership assets. *Story on Partnership*, 348, (a.)

MILLER, J., delivered the opinion of the Court.

By the will of James A. Sangston, who died in April, 1851, the testator appointed his brothers, George E. Sangston and Lawrence Sangston, his executors, and directed them to invest and hold all his estate in trust for the benefit of his two children, with certain limitations over in favor principally of his grandchildren. The executors took out letters of administration upon his estate, and thereby accepted the trusts created and imposed upon them by the will. *Hanson and Wife vs. Worthington*, 12 Md., 418. They then returned to the Orphans' Court an inventory of the personal property, consisting chiefly of household furniture, appraised at \$1622.85, and the inventory then states that: "In addition to the above the deceased had an interest in the firm of Sangston & Co., not ascertained." At the time of the death of the testator, and since the 1st of August, 1843, the three brothers, James, George and Lawrence, were and had been partners in the commercial firm of Sangston & Co., which carried on the wholesale dry goods business in the City of Baltimore. All the estate of the testator seems to have consisted of the furniture above mentioned and his interest in the partnership property, real and personal, belonging to

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

this firm. The estate was never settled up by the executors in the Orphans' Court, and on the 16th of June, 1869, more than eighteen years after the testator's death, the bill in this case was filed by his two children and his grandchildren, beneficiaries under his will, against these executors and trustees for an account. It is not necessary to state at length the averments of this bill or of the answer thereto. Nor shall we stop now to consider and notice in detail the proceedings in the cause prior to the decree for an account. It is sufficient to say that lapse of time and *laches* have not been relied on in the argument before us, and, in view of the relation in which the parties stood to each other, could not be relied on as an absolute bar to the accounting. The liability to account was conceded by the defendants' counsel, and the whole difficulty in the case relates to the ascertainment by the account of the testator's interest in this firm. And as to this many questions have arisen and have been argued with great earnestness and ability. The record is quite voluminous and yet it does not contain some of the exhibits, balance sheets and statements referred to by the witnesses, which might have aided us in reaching proper conclusions on many of the minor points presented by the numerous exceptions taken by both parties to the auditor's accounts. Again the auditor, instead of stating the accounts in the mode usually adopted in equity cases, and with which the Court is familiar, has reached results by a series of schedules or accounts, made out in the mode and on the principles adopted by professional and expert book-keeping accountants, and this we have found has not diminished the labor attending our investigations. These difficulties were suggested to counsel during the argument, and they then expressed the desire that we should confine ourselves to the decision of certain prominent and controlling questions, and assured us that when these were decided it would not be difficult to re-state the accounts and adjust

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

the rights and liabilities of the parties. But apart from this request and assent of counsel, a careful examination of the record has convinced us that this is the only satisfactory mode of now dealing with the case, and we shall accordingly so dispose of it.

1st. The question first in order, if not in importance, is, were the "*Partnership Articles*," under which the partnership between these three brothers was originally formed, in force at the death of James, in 1851? These Articles were signed on the 1st of August, 1843, and by their terms the co-partnership thus formed was to continue for the term of three years, unless sooner dissolved by mutual consent. At the expiration of this period, viz., on the 1st of August, 1846, the same three parties by an agreement in writing appended to the articles, agreed "to continue the *aforegoing co-partnership* for two years from this date, subject to a charge of twelve per cent. of the net profits to Isaac J. Pollard, in lieu of the salary heretofore allowed him." It is very plain that by this agreement the partnership *under the Articles* was expressly continued for two years. At the expiration of this period Pollard left, and the partnership was continued and the business conducted by the three brothers until the death of James, a period of nearly three years, without any further written agreement between them. This is not an unusual occurrence. It frequently happens that a partnership formed under Articles and limited as to time is silently continued after the expiration of the period originally prescribed for its duration, and the business is carried on by the same parties in much the same way with no new Articles and no formal renewal of the old ones. The question then arises under what terms does the law regard the continued partnership to be conducted? "This question," says Judge STORY (*Story on Partnership*, sec. 279) "does not perhaps admit of any uniform or universal answer. It may be affected by various considerations; by

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Sangston, *et al.*, *Adm'ces vs. Hack and Wife, et al.*

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the acts of the parties ; by the habits and changes of their business ; by implications from their omission to act upon certain terms of the original contract and from apparent qualification and exceptions and restrictions of others, in their dealings and settlements with each other or even with third persons. But in the absence of all acts and circumstances whatsoever to control or vary the original terms, the just legal conclusion seems to be, that the partnership is to be treated as a mere partnership during the joint will and pleasure of all the parties, and therefore dissoluble at the will of any one of them, but that in all other respects it is to be carried on upon the original terms thereof as to rights, duties, interest, liabilities, and shares of the profits and losses." And in another part of the same treatise (*secs. 197, 198,*) where the effect of the continuation of a partnership, after the expiration of the original term, without new Articles, is also considered, it is said, "the habits of the trade, and the conduct of the parties may often establish the fact satisfactorily, that some of the Articles have been practically waived, or abrogated, or qualified, while others are necessarily implied as being in full force and operation. In such cases the presumption of the actual state of the partnership contract will necessarily vary with the circumstances, and be governed by them and not govern them." In *Parsons on Partnership*, 239, 240, the learned author in treating of the same question, says the answer to it "must depend mainly on the conduct of the parties. If they go on precisely as before, or in such a way as to indicate no intentional departure from such a course, the former Articles would have much influence in determining the terms of their present association, and probably their provisions would be held to be those of the present partnership excepting such, if any there were, as were plainly inapplicable to the present state of things. On the other hand, if the firm varied, or departed from these provisions,

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Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

or appeared to adopt new ones, they would be considered as making *so far* a different bargain from the old one," but he adds that the renewal of the limitation of time will seldom be presumed from acts or sustained by the law as part of the new bargain on any thing less than proof that the parties had expressly so agreed. The same general rule is also to be found in most of the text books on the Law of Partnership, and it is very clearly and succinctly stated in *Lindley on Partnership*, 678, thus: "If a partnership originally entered into for a definite time is continued after the expiration of that time without any new agreement, the Articles under which the partnership was first carried on, continue, so far as they are applicable to a partnership at will, to regulate the rights and obligations of the partners *inter se*." The authorities which these authors cite as establishing the doctrine clearly sustain it, though the instances in which the question has been directly presented for adjudication are comparatively few. The cases in which it has been most clearly recognized or expressly determined are *Crayshaw vs. Collins*, 15 *Ves.*, 228; *Booth vs. Parks*, 1 *Molloy*, 466; *United States Bank vs. Binney*, 5 *Masson*, 185; *Mifflin vs. Smith*, 17 *Sergt. & Rawle*, 165, and *Bradley vs. Chamberlin*, 16 *Verm.*, 613. The rule as thus stated is not only a convenient, but an equitable and reasonable one, and in our judgment its application, for the purposes of justice in this case, is almost indispensable. It must, therefore, be applied, unless some well founded and unanswerable objection is encountered.

The complainants' counsel has argued that the doctrine applies only in cases where one and the same firm has been continued by the same partners, and that here the intervention of Pollard in 1846 made a new firm, which was dissolved by his retirement in 1848, and that the firm thereafter continued was also in law a new firm. In other words the argument is, that the continuity of the original partnership was broken by a succession of new



Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

firms, and therefore the presumption of the continuance of the partnership Articles fails. It is however a matter of great doubt whether Pollard ever became a partner with the Sangstons. The question relates of course to a partnership *inter sese* and not as to third parties. It is often very difficult to decide whether two or more persons are partners as to each other. The rule is that it is a matter to be determined by the intention of the parties as the same is expressed in the words of their contract, or to be gathered from their acts and all the circumstances which are available for the interpretation of the contract. *Parsons on Part.*, 58; *Potter vs. Kerr*, 6 Gill, 404; *Bull vs. Schuberth*, 2 Md., 38. Previous to the 1st of August, 1846, Pollard had been a clerk in the employ of the firm, and he did not sign the agreement of that date as he naturally would if the purpose had been to admit him as a partner. The Sangstons alone sign it and they thereby agree to continue the previous partnership for two years, "*subject to a charge of twelve per cent. of the net profits to Pollard in lieu of the salary heretofore allowed him.*" This plainly means that instead of the fixed salary which they had before allowed him for his services as clerk, the Sangstons, whilst continuing their own partnership, agreed that Pollard should for two years receive twelve per cent. of the net profits of the business, as compensation for his services during that period. It is very clear that this did not make him a partner, for where a per centage of profits is adopted simply as a mode of measuring the amount of wages, salary or remuneration, the fact that it is made contingent upon profits does not create a partnership. *Lindley on Part.*, 15. In the case of *Bull vs. Schuberth*, (2 Md., 56,) this Court held that the mere fact that remuneration was to depend on the contingency of profits, does not of itself create a partnership, because that is not an uncommon mode of paying agents and servants, and in *Crawford vs. Austin*, 34 Md., 49, it was decided that an agreement by

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*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

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a firm to pay a party one-third of the profits of the business, as compensation for his services as a salesman did not make him a partner. Nor is the case helped by the agreement dated the 17th of April, 1851, endorsed on the Articles and signed by George and Lawrence Sangston, for that simply recites that Pollard's interest of twelve per cent. had ceased by his withdrawal on the 1st of August, 1848, and that the parties signing had on that day purchased that interest, which means that they had paid or settled with him for his twelve per cent. of the net profits during the two years. There would be no difficulty in holding that he was not a partner, were it not for the admission in the answer (which however is by no means explicit on the subject,) and the testimony of Pollard himself which was introduced by the defendants, and in which he says he was a partner. But assuming that this admission and testimony are sufficient to warrant a different construction of the contract, we are still of opinion that his connection with the firm under the circumstances stated, did not prevent the continued operation of the partnership Articles as between the Sangstons after his withdrawal. We have found no authority to that effect, and we are not disposed to make a precedent in that direction.

Again, a clause in the will of James A. Sangston which was executed in December, 1849, is relied on to show that he did not then regard the Articles as in force. One of the conditions of the Articles is, that if either of the parties should die before the first of February or of August, the partnership should continue until the first days of those months respectively, as the case might be, when the business shall cease, and the survivors shall then have the privilege of taking the stock of goods then on hand at an appraisement to be made by duly sworn appraisers, and to continue the business on their own account. A provision like this for the continuance of the partnership after

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

the death of a partner for a short period until the close of the respective business seasons of the year, is neither unreasonable nor unusual in partnership Articles. The agreement of the 17th of April, which was evidently made by the surviving partners after the death of James in that month, seems to have been executed by them for the very purpose of carrying out this condition and providing for a continuance of the partnership under the Articles until the 1st of August following. By his will the testator directs that for *three years* after, and dating from his decease, his portion of the *capital* should remain in the firm, the surviving partners paying him interest for the use thereof, and at the end of these three years, the principal to be paid to his executors, and he adds that he does this for the convenience of the firm and not as a continuation of his interest or share therein, or as entitling his heirs or representatives to a participation in the profits, or as subjecting them to liability for losses *during that time*. Now we cannot think that in thus allowing his surviving brothers and partners the use of his capital for three years, he had in view or intended to interfere with the continuance of the partnership for the short period after his death provided for in the Articles. The whole scope and tenor of this clause of the will as well as the purpose it was manifestly intended to subserve could be gratified without interfering with this condition of the Articles, and in our opinion it does not show that the testator supposed when he wrote it that the Articles were no longer in force. Another condition of the Articles is that the profits should be divided in the proportion of three-eighths each to James and George, and one-fourth to Lawrence. The answers aver that on the 1st of August, 1848, this condition was by verbal agreement between them changed so that the three should be placed on equal terms as co-partners, and this averment seems to be supported by the testimony in the case independent of that of Lawrence

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*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

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Sangston himself. Changed in this respect only, we are of opinion the Articles were in force at the death of the testator, and we accordingly so adjudge and determine.

2nd. On the 1st of August, 1851, the defendants, the surviving partners, formed a new co-partnership, under the same name of Sangston & Co., and continued in business for nearly three years when they failed. The proof, however, shows that they have paid all the partnership debts of the old firm, and the next question to be decided is, was the Circuit Court right in directing the account to be stated "from the books still extant"? By this we understand the Court as referring principally to the Cash-Book and Ledger D, which have been laid before us, and used in the argument. The first is a book of original entries, commencing in January, 1851, but the Ledger (which also contains entries prior to April, 1851,) of course is not of that character, and both of them contain entries relating to the settlement of the business of the old firm made after the death of James Sangston. But notwithstanding this, we are of opinion, from considerations pertaining exclusively to the circumstances of this case, there was no error in allowing these books to be used in stating the account, and we shall now state briefly, some of the principal reasons that have led us to this conclusion. It is averred by the defendants that all the other books relating to the business of the old firm prior to the death of the deceased partner, consisting of the usual books of an extensive mercantile house, were, after having been preserved for a long time, sold in 1865, by Lawrence Sangston as waste paper. This averment is supported as well as could be expected, without resort to the direct evidence on the subject of Lawrence Sangston himself, by the testimony of the witness Berger, who says he was at that time engaged in buying old books for paper manufacturers, and bought from Lawrence Sangston about one thousand pounds of such books, and made similar purchases from

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

various other merchants. We find nothing in the record to justify the inference that these books were thus disposed of for the fraudulent purpose of destroying them as evidence against the defendants. In July, 1854, shortly after the failure of the new firm, a petition was filed in the Orphans' Court by the testator's son, (one of the present complainants,) who was then of full age, and by Mrs. Hack, the testator's daughter, through her husband, who, as the record shows, was then a practicing lawyer diligent and active in protecting the interest of his wife and children, calling upon the defendants as executors for a statement of the then unascertained interest of their father in the old firm. This was promptly met by an answer from the defendants in which they allege in substance, that the old firm was actually insolvent, and that their own failure was caused by their efforts to pay the large indebtedness of that firm, and that upon the final winding up of its affairs the interest of the testator's estate therein would amount to nothing. After this petition and answer no further proceedings were taken either in that Court or a Court of equity until the filing of this bill, a period of nearly fifteen years. This son of the testator was in the employ of the old firm as assistant book-keeper at the time of his father's death, and continued with the new firm in the same capacity for some time thereafter, and in his testimony he admits that after the new firm failed, he with his uncle George made a cursory examination, lasting some two or three hours, of his father's affairs, and in that examination his uncle showed him a list of bad debts and losses the bulk of which happened in his father's life-time, and of which witness was himself conversant, and that in the examination of the books then made, they went over these debts and losses. It is also clearly shown that for many years thereafter the same party had ample opportunity, if he had chosen to avail himself of it, to make a further and full and thorough examination of these books, but as it

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Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

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appears no such examination was ever made. While this long lapse of time, and laches and negligence on the part of the complainants, are not, as we have said, an absolute bar to the account prayed by this bill, they must have weight in considering the complaints now made as to the destruction of the other books, and must have a potent influence in determining the question whether the books now before us ought to be used in stating that account. But more important than all this, it is clearly proved, wholly apart from the books, and the answers, and the testimony of Lawrence Sangston, that the old firm was *actually insolvent* when James Sangston died. That fact is established by the testimony of Pollard, and the complainants themselves have confirmed it by the introduction in evidence of the letter of the defendants to Mr. Hack of the 24th of June, 1854, in which that insolvency is very explicitly asserted. If then, these books are not to be used what basis is there for an account that would be of any benefit to the complainants? We have carefully examined the record and can find none. In face of the proved fact that the firm was insolvent when the testator died, we do not see what account could be stated beneficial to the complainants without recourse to these books and the terms of the partnership Articles regulating the liability of the partners for the capital advanced. Of course we are not to be understood as intimating that a trustee, executor or surviving partner can take charge of a trust estate, and in its administration preserve no vouchers of his disbursements, and yet discharge himself simply by entries made by himself in his own books after the trust commenced. In such case the salutary and just rule is to hold the delinquent party to the strictest proof as to disbursements, and the most rigid accountability, wherever the amount of the estate committed to his charge is once admitted or ascertained. But in this case the difficulty lies in ascertaining the cardinal fact whether any trust

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

estate whatever, as respects the interest of the testator in this firm, came to the hands of these defendants as his executors. It seems to us that this fact cannot be ascertained without resort to these books and the partnership Articles. Their use has, in our opinion, become an absolute necessity for the complainants themselves, and is imperatively demanded by the peculiar circumstances of this case. Without them, nothing in the likeness of justice, could be meted out to the parties on either side.

While the books may be thus used, it is of course open to the complainants to controvert any of the items therein. That has been successfully done, as to the charge of \$6000 against James Sangston, made as of the 31st of August, 1854, and that item was very properly abandoned by the defendants, and does not appear in the auditor's accounts. But we agree with the Court below, that it is sufficiently shown that the appraisement of the stock of goods on hand, on the first of August, 1851, was made in compliance with the provision of the partnership Articles on that subject, and we are also of opinion that the item of \$23,483.40, credited to the old firm in the account between that firm and the new firm, found in Ledger D, represents the amount of such appraisement.

3rd. The next question is, were the defendants, as surviving partners, entitled to compensation for their services in winding up the concerns of the old partnership? That such compensation cannot be allowed, unless it be specially so stipulated, is familiar and elementary law. *Story on Part., sec. 331.* But in this case, the partnership Articles expressly provide that the surviving partners "shall be allowed a reasonable compensation for closing the business, said compensation to be fixed by the Orphans' Court, or by three disinterested persons." By the terms "closing the business," we understand the parties to mean the settlement up of the partnership affairs, or in other words, the collection of its assets, and the application of them to

Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

the payment of its debts. That this was done by the defendants we have no doubt, and the fact that while doing it, they formed a new partnership, and continued the same business at the same place, as the Articles contemplated or permitted, furnishes no good reason why they should be deprived of the benefit which this express stipulation gave them. It would be peculiarly unjust so to do, if in their efforts to pay all the debts of the old firm the defendants devoted, as it appears they did, a portion of their own means to the purpose, and thereby brought about their own financial failure and ruin. The mode of ascertaining the compensation prescribed in the Articles, cannot now be carried out, and the only way in which a Court of equity can arrive at it is by receiving the testimony of witnesses as to what, in their judgment, the services rendered were worth. That was done in the Court below, but the circumstances under which the testimony of the three witnesses on that subject was given, are such that the complainants ought not to be precluded from examining witnesses on their side, and when the cause is remanded that privilege must be allowed them. We are also of opinion that in the adjustment of this compensation no commission, or percentage should be allowed on the amount advanced by the defendants to pay debts. Such services are not within the terms of the Articles, and if in the accounting the defendants are allowed the sum so advanced, with interest, it is all they are entitled to on that score.

4th. The next question relates to the statement of the capital account and the rights and liabilities *inter sese* of the several partners, in respect to the capital advanced by each. We think it clear that this question must be settled by the terms and provisions of the partnership Articles. By those Articles it was agreed that James and George should bring in capital coming from a certain source to an amount not to exceed the sum of \$30,000



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Sangston, *et al.*, Adm'ces *vs.* Hack and Wife, *et al.*

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each, for which they were "to be allowed interest at the rate of six per cent. per annum from the time it is paid in," and that Lawrence should bring in, as soon as realized, all his means and interest in a certain other firm, "to bear a like interest of six per cent." There was actually brought in by James and George the sum of \$47,298.61, each contributing an equal part thereof, but it is conceded that nothing was ever brought in by Lawrence. This, therefore, is not the case of a partnership in which it is agreed that one partner shall contribute his services, labor, or skill as against the capital of the others, but the usual case in which each agrees to contribute and put at the risk of profit or loss, money as capital. In such a case where the enterprise proves a failure, and the capital is lost and absorbed by debts, it is equitable and just that the partner who has failed to comply with his engagement, and has brought in nothing, should make good to his co-partners the proportionate share he agreed to furnish, or in other words, should be made to share equally with them in the loss of capital. We have been referred to no authority, and have found none in which a different doctrine has been announced. Then as to the allowance of interest on the capital contributed by James and George. That too we think is covered by the terms of the Articles. It is to bear interest from the time it is paid in, and in our opinion the defendants have no good ground of complaint as to the period for which interest has been calculated by the auditor in the statement of the capital account.

5th. The amount appearing in the auditor's schedules as having been *advanced* by the defendants out of their own means to pay the debts of the old firm, is derived from the account, found in Ledger D, between that firm and the new one. Some of the items of disbursements in the latter part of this account were made at so late a period after the dissolution of the old firm by the death of James

*Sangston, et al., Adm'ces vs. Hack and Wife, et al.*

A. Sangston, as to give rise to a reasonable doubt whether they could have been on account of the debts of that firm. We shall, therefore, leave the question of amount open for further investigation, and further proof on the part of the complainants, if they may have any to adduce. But whatever this amount when definitely ascertained may be, we entirely agree with the defendants' counsel that the accounts must provide for its payment with interest, out of the remaining assets of the old firm before the capital is taken care of. These assets consist of the warehouse on Baltimore street, and the house and lot on Edward street. The decree directs them to be sold, and we are of opinion this sale should be made before the accounts are finally stated, for by so doing the amount of such assets will be definitely ascertained and the adjustment of the accounts will thereby be greatly facilitated.

6th. In considering the case we have not relied upon the testimony of either of the defendants, and we are satisfied the objection to their competency as witnesses is well taken. It is sufficiently sustained by the decision in *McKaig vs. Hebb, et al.*, 42 Md., 227.

We have thus disposed of the leading and most important questions in the case, and shall add but a word upon another point. It was alleged in argument that in the auditor's schedules interest has in some cases been compounded. But it is answered that as this has been done on both sides no harm has resulted. All that we propose to say on this question is, that in the re-adjustment of the accounts to be hereafter made, no compounding of interest or calculation of it by rests should be made to the prejudice of either party.

It follows that the decree appealed from must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

*Decree reversed, and  
cause remanded.*

(Decided 20th June, 1879.)

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Buschman & Cook vs. Codd.

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Judges ROBINSON and IRVING dissent from so much of the foregoing opinion, as decides that the books and entries of the defendants are admissible in evidence, to charge the complainants in regard to the settlement of the old firm of Sangston & Co.

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J. D. E. BUSCHMAN and SYLVESTER COOK vs. WILLIAM  
H. CODD.

*When an Action for False representation will lie—Character of the Representation requisite to support an Action—Measure of Damages in an Action of Deceit—Admissibility of Evidence.*

Whenever one person makes a false representation, knowing it to be false, with intent to induce another to enter into a contract, which, but for such representation, he would not have entered into, and he is thereby damnified, a case of fraud is made out, and an action will lie.

The representation to be material, must be in respect of an ascertainable fact, as distinguishable from a mere matter of opinion. A representation which merely amounts to a statement of opinion, judgment, or expectation, or is vague and indefinite in its nature and terms, or is merely a loose conjecture or exaggerated statement, is not sufficient to support an action.

An action was brought to recover damages, alleged to have been sustained by the plaintiff by means of false and fraudulent representations, made to him by the defendants, by which he was induced to purchase a half interest in the business of manufacturing artificial marble. **HELD:**

That to entitle the plaintiff to recover, it was necessary for him to prove, that with a view to induce him to make the purchase, the defendants represented to him that the business was profitable, valuable and flourishing, and that they had at the time large outstanding contracts for work; that such representations were false

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Buschman & Cook vs. Codd.

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in fact, were made with the fraudulent intent to cheat and deceive him; that in making the purchase, he relied on such representations, and would not have made it except upon the faith of the same; and that in consequence thereof he was misled and injured.

Whether the plaintiff under the circumstances of the case, was obliged in any manner to make inquiry in regard to the truth of the representations, *Quære?*

In an action to recover damages, alleged to have been sustained by the plaintiff by means of false and fraudulent representations, made to him by the defendants, by which he was induced to purchase a half interest in the business of manufacturing artificial marble, he is entitled to recover such damages as may have been the natural and necessary result of such false representations, not exceeding in amount the sum paid by him for such purchase, with interest.

In an action to recover damages alleged to have been sustained by the purchase of a half interest in the business of manufacturing artificial marble, which the plaintiff was induced to make by means of the false and fraudulent representations of the defendants, he testified on cross-examination, that he had sold such half interest for a house on Broadway, which was subject to a mortgage of \$1600, and that it was not worth the mortgage. This house together with a house belonging to his wife, he subsequently exchanged with one Gruman for a tract of land in Virginia. In reply to a question by the defendants, he denied having told Gruman that he had refused \$2250 for the Broadway house. The defendants then offered to prove by Gruman, that the plaintiff told him that he, plaintiff, had refused an offer of \$2250 for the house at public sale.  
HELD:

That such declaration or admission of the plaintiff was admissible in evidence.

APPEAL from the Circuit Court for Howard County.

This case was instituted by the appellee against the appellants in the Baltimore City Court. Subsequently on motion of the defendants, the case was removed to the Circuit Court for Howard County, where it was tried. The case is stated in the opinion of the Court.

*First Exception.*—Stated in the opinion of the Court.

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Buschman & Cook *vs.* Codd.

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*Second Exception.*—The plaintiff offered two prayers, which the Court rejected, and in lieu thereof, instructed the jury as follows :

“If the jury find from the evidence, that the defendants were partners in business, and as such, were the owners of a certain patent, and that in pursuance of a fraudulent combination entered into between said defendants, they falsely represented to the plaintiff that in conducting their said business, they had entered into large and valuable contracts which would be remunerative, and made such false representations with intent to deceive the plaintiff, and that the plaintiff relied upon the same, and had not at hand the means to ascertain the truth of such representations, and that the plaintiff was by means of such representations, and in reliance thereon, induced to purchase an interest in said business, and has suffered damage therefrom, then the plaintiff is entitled to recover such loss as may have been the direct result of such false representations, not exceeding in amount the sum paid by him for such purchase, with interest.

The defendants offered ten prayers, all of which the Court rejected, except the ninth and tenth as follows, which it granted :

9. That in order to entitle the plaintiff to recover in this case, it is incumbent on him to show to the satisfaction of the jury, that with a view to induce the plaintiff to make the purchase in question, the defendants represented to him that the business was profitable, valuable and flourishing, and that they had, at the time, large outstanding contracts for their work, that such representations were false in fact were made with the fraudulent intent to cheat and deceive the plaintiff; that the plaintiff had not at hand the means of verifying for himself the truth of such representations; that in making such purchase he relied on such representations, and would not have made it except upon the faith of the same, and that in consequence thereof, he was misled and injured.

10. If the jury find from the evidence that the defendant, Buschman, bought a half interest in the patent in question, for the sum of \$1750, and a half interest in the business for the further sum of \$2000, and that afterwards the defendant, Cook, bought a half interest in said patent and business for the sum of \$3500, or thereabouts, and that the defendants then formed a co-partnership, and as partners, from time to time contributed to the said business further sums, amounting in the aggregate to \$1000, or thereabouts, apiece; and if the jury further find, that subsequently the plaintiff purchased from the defendant, Cook, his one-half interest in said patent and business, for the price of \$5000, or thereabouts, then the plaintiff is not entitled to recover, unless the jury shall further find from the evidence that the plaintiff was induced to make such purchase by means of the representations of the defendants, that they had large outstanding contracts on hand with sundry parties for their work; that said representations were false, in fact, and were made by the defendants fraudulently and deceitfully, and with the intent that the plaintiff should act thereon, believing the same to be true, and that the plaintiff had not at hand the means of verifying the said statements of the defendants, and was thereby induced to make said purchase, and was injured thereby.

In lieu of the first, second and third prayers of the defendants which the Court (Full Bench) rejected, it gave the following instruction:

“That the plaintiff is not entitled to recover on account of any representations they may find the defendants, or either of them, may have made to the plaintiff respecting the patent right, or of the value or profitableness of the business they were carrying on, and the jury must exclude such representations from their consideration as constituting of themselves a basis of recovery in this action.”

To the giving of the instruction by the Court, in lieu of the plaintiff's prayers, and of the instruction in lieu of the

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Buschman & Cook *vs.* Codd.

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defendants' first, second and third prayers, and to the rejection of their first, second, third, fourth, fifth, sixth, seventh and eighth prayers, the defendants excepted. The verdict and judgment being for the plaintiff, the defendants appealed.

The cause was argued before BARTOL, C. J., BOWIE, ROBINSON and IRVING, J.

*John P. Poe*, for the appellants.

*William J. O'Brien*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is an action to recover damages, alleged to have been sustained by the plaintiff, by means of false and fraudulent representations, made to him by the defendants, by which he was induced to purchase a half interest in the business of *manufacturing artificial marble by letters patent*.

At the trial below the plaintiff proved that the defendants were engaged in carrying on said business,—that Buschman, one of the defendants, represented that they were doing a fine business and were making money, that they had a contract with St. Vincent's Church for \$3600, one-half of which was profit,—also a large contract at the Capitol at Washington, and a large contract for work on the new hotels of the Baltimore and Ohio Railroad. That relying upon such representations he purchased through Buschman the half interest of Cook, the other partner, for the sum of five thousand dollars. That soon afterwards a person by the name of McAfee, purchased through Cook, the half interest of Buschman for three thousand dollars. That the business was a complete failure, and the representations thus made, and by which the plaintiff was induced to purchase, were utterly false.

The plaintiff further proved there was a written agreement between the defendants, whereby in the event of a sale by one of his interest in the business, the other was to have one-half of the money paid, or of the property taken in exchange.

The principles of law applicable to cases of this kind were carefully considered in *McAleeer vs. Horsey*, 35 Md., 439, and it was held, that whenever one makes a false representation, knowing it to be false, with intent to induce another to enter into a contract, which but for such representation he would not have entered into, and the plaintiff has been damnified, a case of fraud is made out, and an action will lie.

The representation to be material, must be in respect of an ascertainable fact as distinguishable from a mere matter of opinion. A representation which merely amounts to a statement of opinion, judgment or expectation, or is vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support an action. And for the reason, that such indefinite representations ought to put the person to whom they are made, upon the inquiry, and if he chooses to put faith in such statements, and abstained from inquiry, he has no reason to complain. *Jennings vs. Broughton*, 5 De M. & G., 134; *Higgins vs. Samels*, 2 John. & Hem., 464; *Leyland vs. Illingworth*, 2 De F. & J., 248; *Haycraft vs. Crease*, 2 East, 92; *Drysdale vs. Mace*, 5 De M. & G., 107; *Denton vs. Macneal*, L. R., 2 Eq., 352; *Kisch vs. The Central Railway Co. of Venezuela*, 3 De J. & S., 122.

Such then being the law by which this case is to be governed, the defendants certainly have no reason to complain of the several instructions granted by the Court. In these instructions, the jury were told that to entitle the plaintiff to recover, it was incumbent on him to prove that with a view to induce the plaintiff to make the purchase in question, the defendants represented to him that



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Buschman & Cook *vs.* Codd.

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the business was profitable, valuable and flourishing, and that they had at the time large outstanding contracts for work, that such representations were false in fact, were made with the fraudulent intent to cheat and deceive the plaintiff; that the plaintiff had not at hand the means of verifying or ascertaining the truth of such representations; that in making such purchase, he relied on such representations and would not have made it except upon the faith of the same, and that in consequence thereof he was misled and injured.

These instructions covered the whole law of the case. In fact it may be questionable whether the plaintiff under the circumstances of this case was obliged in any manner to make inquiry in regard to the truth of the representations.

In *Vernon vs. Keys*, 12 *East*, 632, the rule was stated to be, that the seller was liable in an action of deceit, if he fraudulently misrepresent the quality of the thing sold, in some particular which the buyer has not *equal means of knowledge with himself*, or if he do so in such a manner as to induce the buyer to forbear making the inquiries, which for his own security and advantage he would otherwise have made.

Where the real quality of the thing is an object of sense, obvious to a person of ordinary intelligence, and the parties have equal knowledge or means of acquiring information by the exercise of ordinary inquiry and diligence, and nothing is said for the purpose of preventing such inquiries as every prudent person ought to make, under such circumstances there is no warranty of the seller's knowledge of the truth of his representations, or of the fact being as it is stated to be.

But here the representations were made by the defendants in regard to a business, the extent, nature and profits of which were peculiarly within their own knowledge; certainly not equally within the knowledge of the plain-

tiff. But be this as it may, the defendants have no right to complain of this qualification of the instructions granted by the Court, and we have only referred to the matter for the purpose of not being understood as deciding that this qualification was necessary in this case.

Objection is also made to the measure of damages as stated by the Court, namely, that the plaintiff was entitled to recover such loss as may have been the direct result of such false representations, not exceeding in amount, the sum paid by him for such purchase, with interest. All the authorities agree in holding, that in cases of this kind, the plaintiff is entitled to recover such damages as are the natural and necessary result of the false representations. This is the rule laid down in the leading case of *Pasley vs. Freeman*, 3 T. R., 51, and with a phraseology somewhat varied but not materially different, it has been adhered to ever since.

Where the property sold has a marketable value, the rule in regard to the measure of damages is stated to be the difference between the price paid and the fair market value of the thing bought.

And when you say the plaintiff is entitled to recover such damages as may be the direct result of the false representations by which he was induced to purchase, it is equivalent to saying that the damages recoverable are the difference between the price paid and the fair market value of the thing bought.

The rule laid down in this case was approved by this Court in *McAleeer vs. Horsey*, 35 Md., 439.

Being of opinion that the defendants' ninth and tenth prayers, and the prayer granted by the Court as a substitute for the plaintiff's prayers, covered the whole law of the case, we deem it unnecessary to consider in detail the several prayers offered by the defendants and refused by the Court.

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Buschman & Cook *vs.* Codd.

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The first exception presents a question in regard to the admissibility of evidence. The plaintiff upon cross-examination testified that he had sold his half-interest in the business for a house on Broadway, which was subject to a mortgage of \$1600, and that it was not worth the mortgage. This house, together with a house belonging to his wife, he subsequently exchanged with one Gruman for a tract of land in Virginia. In reply to a question by the defendants the plaintiff denied having told Gruman he had refused \$2250 for the Broadway house.

The defendants then offered to prove by Gruman that the plaintiff told him, that he, plaintiff, had refused an offer of \$2250 for the house at public sale, to which evidence the plaintiff objected, and the Court sustained the objection.

Strictly speaking, the declaration or admission of the plaintiff was admissible in evidence. But it is apparent from the record that the defendants were not in any way injured by the ruling of the Court. If the house was in point of fact worth more than the mortgage debt of \$1600, to which it was subject, it would have been an easy matter for the defendants to have proved it by direct evidence. And for this purpose no one could have been a more competent witness than Gruman himself, who had taken the house, together with a house belonging to plaintiff's wife, in exchange for Virginia land. But there was no attempt to prove by him, or by any other witness, that the house was worth, or would have sold for more than the mortgage debt. It being thus open to the defendants to prove the value of the house by direct evidence, and having failed to offer any such evidence, we do not think that the judgment ought to be reversed, because the Court erred in excluding testimony so *indirect and inconclusive*; and which under the *circumstances of this case* could not have operated to the prejudice of the defendants.

*Judgment affirmed.*

(Decided 20 June, 1879.)

EDWIN L. JONES, Garnishee of RICHARD W. KIMBALL *vs.* MARTHA V. SYER and ROBERT SYER.

*Assignment Void as hindering and delaying Creditors—Deed not to be aided by Extrinsic Evidence.*

An assignment, professing to be for the benefit of creditors generally, of certain goods, stock in trade and other personal property contained a clause, authorizing and empowering the trustee "to carry on and conduct said business *in his discretion, for such time as in his judgment it shall be beneficial to do so*, or to sell all of said goods and stock in trade and property, *at such times, in such manner, and for such prices as he may deem proper*, and apply the proceeds," &c. HELD:

That the certain effect of this clause would be to hinder and delay creditors; and as against them such provision rendered the deed void.

A deed must speak for itself, and its obnoxious provisions cannot be aided, modified or explained by extrinsic evidence.

APPEAL from the Court of Common Pleas.

The appellees recovered a judgment for \$1635, with interest and costs, in the Court of Common Pleas against Richard W. Kimball on the 14th of January, 1875. Upon this judgment an attachment was issued on the 15th March, 1878, and on the same day was laid in the hands of Edwin L. Jones, the appellant, as garnishee. The garnishee pleaded *nulla bona*, and on this plea issue was joined.

At the trial there was offered in evidence a bill of sale from Richard W. Kimball to Edward M. Cleary, dated the 9th of March, 1874, which was admitted subject to exception, whereby the former undertook, for the alleged consideration of \$3000, to convey to the latter, all the stock of hardware and merchandise, together with the fixtures, &c., contained in the store and on the premises

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Jones, Garn. vs. Syer.

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No. 274 South Broadway, and other personal property. There was also offered in evidence, and admitted subject to exception, a bill of sale dated the 1st of February, 1878, from Richard W. Kimball and Edward M. Cleary to Edwin L. Jones, which set out as follows:

“Whereas, the said Edward M. Cleary is holder of the legal title of the stock in trade and personal property hereinafter referred to, but owes and stands indebted unto the said Richard W. Kimball, for the balance of purchase money due and owing for the original stock in trade, amounting to the sum of three thousand dollars; and whereas, the said Cleary, in addition to said indebtedness to said Kimball, is indebted to sundry persons for goods sold and delivered to him, in the business heretofore carried on by him at No. 274 S. Broadway, in said city; and whereas, said Cleary is unable to pay his debts in full, including the debt due to said Kimball as aforesaid, and is now desirous of having his said stock in trade sold and applied to the payment of all his debts, contracted and owing in connection with said business, and after the payment of such debts, to apply the balance towards the payment of his said indebtedness unto the said Kimball; and whereas, the said Kimball being also indebted to sundry persons, which he is unable to pay in full, is desirous of having such sum as shall be paid on account of said indebtedness to him, applied towards the payment of his debts.

“Now, therefore, this bill of sale witnesseth, that for and in consideration of the premises and of the sum of one dollar, to said Edward M. Cleary and Richard W. Kimball do bargain and sell unto the said Edwin L. Jones, trustee as hereinafter mentioned, all the goods, stock in trade, consisting of hardware and ship chandlery goods and personal property, now in and about the stores Nos. 272, 274, 276 S. Broadway, and in possession of said Cleary and all the books, book-accounts and debts due

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Jones, Garn. *vs.* Syer.

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and owing to said Cleary, and twenty-five shares of the Oakum Manufacturing Co. of Baltimore City.

"To be held by the said Edwin L. Jones, in special trust and confidence, nevertheless, and to and for the trust purposes following, and to and for no other purpose whatever, that is to say:

"In trust to carry on and conduct said business in his discretion, for such time as in his judgment it shall be beneficial to do so, or to sell all of said goods and stock in trade and property, at such times, in such manner and for such prices as he may deem proper, and apply the proceeds derived from such sales or the conduct of said business, first, to the payment of all expenses incurred by said trustee in the management of said business, or in the sale of said goods and stock in trade; and secondly, to the payment in full of all debts due and owing by said Cleary, in connection with and on account of said business, if the amount derived from said trust property and business shall be sufficient for that purpose, and if not, then to distribute the same equally amongst said creditors *pro rata*; and as to any balance which shall remain in the hands of said trustee, after payment of said expenses, and the debt of said Cleary as aforesaid, in trust to pay and distribute the same amongst all the creditors of the said Richard W. Kimball."

The plaintiffs proved by Edwin L. Jones, the trustee and garnishee, that he continued the business at 274 South Broadway, from the 1st of February, 1878, to the 12th of June following, when he sold it out at auction. It was admitted that the amount of the proceeds of sale and collections were sufficient to satisfy the judgment upon which the attachment in this case was issued.

*First and Second Exceptions.*—Stated in the opinion of the Court.

*Third Exception.*—The plaintiffs asked the Court to instruct the jury as follows:

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Jones, Garn. vs. Syer.

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The case having been closed on both sides, the plaintiffs asked the Court to instruct the jury as follows:

1. That the paper-writing offered in evidence by defendant, and bearing date February 1st, 1878, purporting to be a deed of trust, is a void instrument, provided the jury find the facts stated in the second prayer of the plaintiffs.

2. That if the jury find that the witness Kimball was indebted to the plaintiff, Martha V. Syer, the wife of the plaintiff, Robert Syer, on a promissory note for fifteen hundred dollars, dated January 6th, 1869, payable two years after date, given in evidence, the said note being drawn to her order by her then name of Martha V. Foley, and that said plaintiffs obtained a judgment on said note in this Court against the said Kimball, for the sum of \$1635, on the fourteenth day of January, 1875, as shown by the original papers in said case given in evidence; and if the jury shall further find that said judgment is due and unpaid, and that the said Kimball was the owner of the stock of goods conveyed to Edwin L. Jones by the bill of sale given in evidence, dated February 1st, 1878, then the plaintiffs are entitled to recover the amount of said judgment and interest thereon, and the plaintiffs' costs in said case of *Syer vs. Kimball*, it being conceded by the defendants in this case, that he has in his hands a sufficient sum of money, the proceeds of sale of said stock of goods, to pay the same.

And the garnishee submitted the following prayers:

1. That the deed of trust offered in evidence, bearing date February 1st, 1878, contains no requirements for releases to creditors, nor any reservation in favor of the grantors or their families, and is therefore not invalid because of its omission to convey *all* the property of the grantors for the benefit of their creditors, nor is said deed rendered void by the discretion therein given the trustee, as to the carrying on of the business and the sale of the goods and chattels mentioned.

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Jones, Garn. vs. Syer.

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2. That if the jury find the execution of the deed of trust offered in evidence, dated February 1st, 1878, and that the trustee therein named, took possession of the goods and chattels mentioned in the deed as such trustee, prior to the issue of the attachment in this case, and to the issue of any execution upon the judgment of the plaintiffs, upon which said attachment is founded, then the plaintiffs are not entitled to recover in this action.

The Court, (BROWN, J.,) granted the plaintiffs' prayers and rejected those of the defendant. The defendant excepted. The jury gave a verdict for the plaintiffs for \$2025.62, and judgment was rendered for the same, with interest and costs. The defendant appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*Dennis Claude, John M. Carter and John Carson*, for the appellant.

*Alexander H. Hobbs*, for the appellees.

ALVEY, J., delivered the opinion of the Court.

If the property embraced in the assignment to Jones, of the 1st of February, 1878, really belonged to Kimball, and the assignment was void, as contended by the appellees, the latter were clearly entitled to recover.

The assignment professes to be for the benefit of creditors generally, and does not exact releases from the creditors as a condition upon which they are allowed to share in the proceeds of the sales of the property assigned ; but, by the express terms of the deed, the trustee, who is the garnishee in this case, is authorized and empowered "to carry on and conduct said business *in his discretion, for such time as in his judgment it shall be beneficial to do so*, or to sell all of said goods and stock in trade and property,



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Jones, Garn. *vs.* Syer.

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*at such times, in such manner, and for such prices, as he may deem proper, and apply the proceeds," &c.* It is obvious, the certain effect of this clause would be to hinder and delay creditors; and as against them such provision renders the deed utterly void. It is an attempt on the part of the debtor to place his property, for an uncertain and indefinite period, beyond the reach of his creditors, and to make their rights in a great measure dependent upon the uncontrolled discretion of a trustee of the debtor's own selection. The law will tolerate no such attempt, but treats the act as a fraud upon creditors, and the instrument of conveyance as simply void as against them. The cases in this Court of the *American Exchange Bank vs. Inloes, Garn. of Turnbull & Co.*, 7 Md., 380; *Same Case*, 11 Md., 173, and the recent case of *Maughlin vs. Tyler*, 47 Md., 545, are, in all respects, entirely conclusive of this, and it is unnecessary to refer to other authorities upon the subject.

It was attempted to be shown by the testimony of the trustee and garnishee himself, that the discretion given him by the terms of the assignment as to the manner and time of disposing of the property, was intended to be exercised for the exclusive benefit of the creditors; and the rejection of such evidence was the subject of the first exception taken by the appellant. But it is perfectly well settled that the deed must speak for itself, and that its obnoxious provisions cannot be aided, modified or explained, by extrinsic evidence. The cases of *Malcolm vs. Hodges*, 8 Md., 418, and *Inloes vs. American Exchange Bank*, 11 Md., 173, are conclusive of this question; and the Court below was clearly right in ruling as it did upon the offer of this evidence.

As to the second exception taken, that relates to a question of the right of set-off attempted to be set up by the garnishee as against Cleary, one of the grantors in the assignment; but that question has become wholly imma-

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Murray *vs.* McShane.

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terial, inasmuch as, under the instruction of the Court, the jury have found that the property assigned belonged to Kimball, and not to Cleary. A debt due from Cleary to the garnishee constituted no set-off as against the claim of the appellees, upon the assumption that the property assigned, or its proceeds in the hands of the garnishee, belonged to Kimball, the judgment debtor in the attachment; and that question is definitely settled by the verdict of the jury.

Finding no error in any of the rulings excepted to, we affirm the judgment.

*Judgment affirmed.*

(Decided 20th June, 1879.)

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PATRICK MURRAY *vs.* JOHN McSHANE and HENRY McSHANE.

*Liability for a Special injury occasioned by a public Nuisance—Right of a Traveller on a street.*

A person lawfully passing along a street, who stops on the door sill of a house fronting on the street, for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted.

Travellers on a street, have not only the right to pass, but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street, or doorways, or wantonly injure them.

A ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch, or a pit-fall dug by its side.

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Murray vs. McShane.

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APPEAL from the Court of Common Pleas.

This action was brought by the appellant against the appellees, and at the conclusion of a jury trial, the *narr.* was amended to appear as follows :

For that the said defendants, at the time of happening of the grievance hereinafter complained of, and for a long time previously thereto, were possessed of certain fixed property, situate in the City of Baltimore aforesaid, to wit: a messuage fronting on a public street in the said city, generally known as "Hillen street," therein; and being so possessed thereof, they suffered and permitted the front wall thereof, bordering on and adjoining the said street, to become and be greatly dilapidated and out of repair, so that the same became and was a source of peril to all persons lawfully passing upon and using the said street, for a long time before the date aforesaid, as well as then; and afterwards, to wit, on the 18th day of March, A. D. 1878, the plaintiff was greatly injured and hurt, by reason of the falling of a brick out of the said wall and upon his head, *he being then and there temporarily*, and for a necessary purpose of bodily convenience seated within the doorway of the said house, and upon the sill of said door, the said sill constituting a step leading into said house from the aforesaid public highway, with his head projecting beyond the line of the wall of the aforesaid house, in the position which might and could have been occupied by that of a passer-by, and upon the said street, lawfully using the same for purposes of travel, and not having remained in the said posture an unreasonable time, nor in anywise molested or interfered with the inhabitants of the said house, nor been directed or warned to depart therefrom. Whereby, to wit: by reason of the falling of the said brick upon his head, the plaintiff has been permanently injured, and rendered unfit to earn his livelihood by labor, and has been put to great expense in and about endeavoring to be cured of his said injuries, and was for a

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Murray vs. McShane.

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long space of time hindered and prevented from attending to his lawful affairs, and suffered great pain of body and anxiety of mind. And the said plaintiff expressly avers, that his said injury was caused solely by the dilapidated and ruinous state of the wall aforesaid, so as aforesaid allowed and permitted by the said defendants, improperly and contrary to their duty in the premises, and by reason of no other matter or thing whatsoever, and especially by reason of no fault or negligence on his, the said plaintiff's part, thereunto contributing; and the plaintiff claims \$10,000.

The *narr.* as originally drawn contained in lieu of the averment, beginning "he being then and there temporarily," the statement, "he being then and there lawfully in front of the wall aforesaid." The proof on the part of the plaintiff showed that he had seated himself upon the sill of the door leading into the defendants' house on Hillen street (there being no projecting steps) for the purpose of adjusting his shoe, and almost immediately after assuming this posture, and while leaning forward, with his head projecting beyond the front line of the wall, he was struck by the brick which inflicted the injury. The defendants' counsel, all the evidence for both sides being in, claimed that a variance was caused by the word "lawfully," applied to a person whom they charged to be technically a trespasser. The Court was inclined to sustain this position, and the plaintiff amended his *narr.* so as to contain a full statement of the facts developed by his evidence upon this point.

To the amended *narr.* the defendants demurred. The Court sustained the demurrer and judgment was entered for the defendants. The plaintiff appealed.

The cause was argued before BARTOL, C. J., BOWIE, MILLER and ALVEY, J.

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Murray vs. McShane.

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*W. Hall Harris and Charles J. Bonaparte*, for the appellant.

The only question presented by this record is whether a sufferer from a nuisance adjoining a public highway, negligently or designedly continued there by the defendants, is debarred from recovering for his injury, by the naked fact that at the time of the accident a part of his person was upon their premises. It is submitted that a negative answer must be given upon every principle of law, reason and humanity.

A trespasser may be ejected forcibly from the premises upon which he intrudes, or sued for his entry, but the ground-owner is not *legibus solutus* with regard to him. On the contrary, for any *illegal act* from which he suffers, (even for any *excess* of violence beyond what is *strictly necessary* for his removal,) the trespasser can recover as fully as though he were innocent. *Johnson vs. Patterson*, 14 Conn., 1; *Bird vs. Holbrook*, 4 Bing., 628; *Barnes vs. Ward*, 9 C. B., 392; *Loomis vs. Terry*, 17 Wend., 496; *Brown vs. Lynn*, 31 Penn. St., 510; *Daley vs. Norwich & Worcester R. R. Co.*, 26 Conn., 591; *Birge vs. Gardiner*, 19 Conn., 507; *B. & O. R. R. vs. Mulligan*, 45 Md., 486; *Corby vs. Hill*, 93 Eng. Com. L., 568, and cases cited in note; *Rail R. Co. vs. Stout*, 17 Wallace, 660, 661; *Beck vs. Carter*, 68 N. Y., 289, 292, 293; *Norris vs. Litchfield*, 35 N. H., 277, 278; *Townsend vs. Wathen*, 9 East, 277.

Unquestionably this nuisance was continued by the defendants "improperly and contrary to their duty," and their continuance of it was an illegal act. *Barnes vs. Ward*, 9 Com. B., 420, 421; *Wharton on Neg.*, sec. 346.

And since the plaintiff has been greatly damaged in consequence of this illegal act, and "by reason of no other matter or thing whatsoever," his right to recover for this injury would seem to be clear even if the *narr.* showed him to have been a trespasser. *Owings vs. Jones*, 9 Md., 108; *B. & O. R. R. vs. Mulligan*, 45 Md., 486; *B. & O. R. R. vs. Boteler*, 38 Md., 568.

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Murray vs. McShane.

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But he was not a trespasser, even technically. It would surely be monstrous to hold that one using the public highway in front of a wall which has been suffered to become a man-trap, would be disentitled to recover for an injury occasioned by this grave breach of legal duty, because he happened to have his hand or foot, or an end of his garment within the building line of the defendants; and this plaintiff's case is, upon the demurrer's admissions, to the full as meritorious as any of those supposed.

The demurrer was sustained by the Court below mainly on the authority of the *dicta* in *Maenner vs. Carroll, et al.*, (the *decision* was conceded to be distinguishable,) on p. 213 of 46 *Md.*, where this Court says: " \* \* \* Any individual who complains of the manner in which a defendant may have used his own land, should show with certainty and precision both the right of the plaintiff, and the duty of the defendant, and in what manner such right and duty have been violated." And again, " \* \* \* \* having no right to be on the lot \* \* \* \* the injury which the plaintiff suffered \* \* \* \* must be attributed exclusively to his own fault." Neither the letter nor the spirit of this language applies to the present case. The *duty* of the defendant, the violation of which is complained of, was the duty to "take care that" their "fixed property" should be "so used and managed that other persons shall not be injured." (30 *Md.*, 205.) The *right* of the plaintiff, was the right of exemption from dangers arising from the neglect of this duty. The plaintiff's injury in this case cannot possibly "be attributed exclusively to his own fault," when the *narr.* avers and the demurrer admits that it "was caused \* \* \* \* especially by reason of no fault \* \* \* \* on his \* \* \* part." But without dwelling upon these verbal criticisms, it is submitted that the language of *Maenner vs. Carroll, et al.*, is to be construed with reference to the facts of that case, and cannot be invoked to sustain a doctrine at variance not only with the previous

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Murray vs. McShane.

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decisions of this Court, *Irwin vs. Sprigg*, 6 Gill, 200; *B. & O. R. R. Co. vs. Mulligan*, 45 Md., 568; but with the overwhelming weight of judicial authority upon the subject. The judgment of the Court below should be reversed and the cause remanded, that the defendants may plead over to the amended *narr.*

*Arthur Geo. Brown and John Carson*, for the appellees.

The declaration fails to state a sufficient cause of action. It shows that the appellant was injured while he *was trespassing* on the property of the appellees. He was not a traveller, passing along Hillen street, but an intruder, who had seated himself uninvited "within the door-way of the said house, and upon the sill of said door, the said sill constituting a step leading into said house from the aforesaid public highway."

As this Court remarked, in *Maenner vs. Carroll, et al.*, 46 Md., 212, "To constitute a good cause of action, in a case of this nature, there should be stated a *right* on the part of the plaintiff, a *duty* on the part of the defendants in respect to that right, and a *breach* of that duty by the defendants, whereby the plaintiff has suffered injury. Here there is nothing of the sort shown."

After alleging that the wall of the appellees' house "was a source of peril to all persons lawfully passing upon and using the said street," which allegation is that of a public nuisance, giving of itself no private right, the declaration proceeds to show that the appellant was not passing or otherwise lawfully using the public street, but was injured when he was not upon the street at all, but while he was sitting on the door sill, *i. e.*, upon and within the wall of the appellees' house.

There is no statement of a right, nor of a duty in respect of that right, nor of a breach of that duty. "There is no positive right alleged; and without such right the action cannot be maintained." *Maenner vs. Carroll, et al.*,

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Murray vs. McShane.

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46 *Md.*, 217; *Gantret vs. Egerton*, 2 *Com. Pl.*, (*L. R.*,) 371; *Sullivan vs. Waters*, 14 *Irish Com. Law*, 460.

The declaration is fatally defective in form and substance, and the demurrer was properly sustained.

In addition to the decision of this Court in *Maenner vs. Carroll, et al.*, which was regarded by the Court below and by the appellees as decisive of this case, and upon which appellees now confidently rely, they refer to the following authorities, which show that for such an injury as is complained of in the declaration, there is no liability to a trespasser, or to a person present by mere sufferance. *Pittsburg, F. W. and Chicago R. R. vs. Bingham*, 29 *Ohio State*, 364-5, 367-8-9, 373; *Gillis vs. Penn. R. R.*, 59 *Penn. State*, 129, 141, 143; *Nicholson vs. Erie Rwy. Co.*, 41 *N. Y.*, 525, 532, 533, 538, 539; *Cooley on Torts*, 660-1; *Wharton on Negligence*, (1st Ed.,) sec. 351; *Sweeny vs. Old C. R. R. Co.*, 10 *Allen*, 372; *Pierce vs. Whitcomb*, 48 *Vermont*, 131; *Bush vs. Brainard*, 1 *Cowen*, 78.

It was argued below that although the appellant was technically a trespasser, as regards that part of his person which was within and upon the wall of the house, yet that he was seated "with his head projecting beyond the line of the wall of the aforesaid house, in the position which might and could have been occupied by that of a passer by and upon the said street, lawfully using the same for purposes of travel," and that therefore the appellant, as regards his head—considered apart from the rest of his body—was entitled to all the privileges and immunities "of a passer by, and upon the said street, lawfully using the same for the purposes of travel."

The appellant was not in a "semi-detached" condition. It is admitted that at the time of the injury, he was sitting, uninvited, within the limits of the appellees' house, and was therefore, to that extent a trespasser. He was not in fact, and could not be considered in law, at one and the same moment of time, a traveller on the



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Murray vs. McShane.

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highway, as regards his head, and a trespasser as regards the rest of his person. He was not a traveller at all.

But even if the appellant had not been sitting where he was, but had been injured by a falling brick while he was wholly upon the sidewalk in front of the appellees' house, under the circumstances set forth in the declaration, he could not have recovered. *Reg. vs. Pratt*, 4 E. & B., 860, (82 E. C. L.); *Norristown vs. Moyer*, 67 Penn. State, 355, 356, 359, 360, 361, 367; *Adams vs. Rivers*, 11 Barb., 390-397; *Blodgett vs. Boston*, 8 Allen, 237; *Stickney vs. Salem*, 3 Allen, 374; *State vs. Buckner*, Phil. N. C. Law, 558; *State vs. Widenhouse*, 71 N. C., 279; *Stinson vs. Gardner*, 42 Maine, 308; *Orcutt vs. Kittery*, 53 Maine, 504.

For the concealed defect of which the appellant complains, viz., a loose brick in a wall, the appellees would not have been liable even if he had been a visitor or invited guest at the house on Hillen street, instead of being, as in fact and law he was, a trespasser. *Southcote vs. Stanley*, 1 H. & N., 247; *Hounsell vs. Smyth*, 7 C. B., (N. S.), 731; *Bolch vs. Smith*, 7 H. & N., 736; *Wilkinson vs. Fairrie*, 1 H. & C., 633; *Wharton on Neg.*, (2nd Ed.,) sec. 350.

BOWIE, J., delivered the opinion of the Court.

The question raised by the demurrer in this case is, whether the owner of a house fronting on a public street, is bound to keep it in such a state of repair, that persons passing by, and lawfully using the property and street shall be protected from harm?

The averments of the *narr.* admitted by the demurrer are substantially as follows:

The defendants being the owners of a house fronting on a public street in Baltimore, suffered the walls to become dilapidated, and the plaintiff passing the said house sat on the sill of the door temporarily for a necessary purpose, his head being projected into the street, when a brick fell from the wall of the defendants' house, and struck the

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Murray vs. McShane.

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head of the plaintiff, without the wrong or negligence of the plaintiff, thereby inflicting the injury complained of.

The defendants contend that the plaintiff was a trespasser, and being such, contributed to his own hurt, and cannot recover for the consequences of his own wrong.

The appellant insists that the defendants by their demurrer admit their possession of certain fixed property, and that they suffered and permitted the front wall thereof, bordering on and adjoining the said street, to become and be greatly dilapidated and out of repair, so that the same became and was a source of peril to all persons lawfully passing upon and using the street, which constituted a nuisance, for which the defendants would be liable to those suffering special damages therefrom.

The principles upon which the appellant's theory is based, are distinctly announced after a very elaborate review of the authorities by this Court, in the case of *Deford vs. The State, use of Keyser*, 30 Md., 205, in the course of which it is said, "in all cases where a party is in possession of fixed property, he must take care that it is so used and managed, that other persons shall not be injured."

In the case of *Irwin vs. Sprigg*, which was an action for an injury resulting from the non-enclosure of an area, around a basement window of a house of the defendant, this Court held it was an act of wrongful negligence, not to protect it from persons passing through such public street, and rendered the owner liable for accidents resulting therefrom, 6 Gill, 200, citing *Copeland vs. Hardingham*, 3 Campbell's Repts., 398, in which Lord ELLENBOROUGH said, "however long the premises might have been in that situation, as soon as the defendant took possession of them he was bound to guard against the danger to the public, and was liable for the consequences as if he had originated the nuisance."

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Murray vs. McShane.

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The appellees contend, that the appellant's *narr.* fails to show a sufficient cause of action, that he was not a traveller passing along the street, but an intruder, who seated himself uninvited, within the door of the house, the sill being a step leading into said house from the public highway.

They rely with emphasis, upon a remark of the Judge delivering the opinion of this Court, in the late case of *Maenner vs. Carroll, et al.*, 46 Md., 212: "To constitute a good cause of action, in a case of this nature, there should be stated a *right* on the part of the plaintiff, a *duty* on the part of the defendants in respect to that right, and a breach of that duty by the defendants, whereby the plaintiff has suffered injury," and insist that there is no statement of a right, nor of a duty in respect of that right, nor a breach of that duty.

The proposition relied on by the appellees is a concise deduction from the adjudged cases, and a conclusion from first principles; there cannot be a wrong, without a right. But the question is, whether the facts set out in the appellant's *narr.* do not show a case of right violated, and of duty neglected, and of injury resulting from that neglect of duty?

The obligation of the common and civil law, "*sic utere tuo ut non alienum lædas*," as recognized by the cases before cited, imposed upon the defendants the duty of keeping their premises in such repair, that persons lawfully using the street and premises, should do so without injury. Travellers on a street, have not only the right to pass, but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street or doorways or wantonly injure them.

A ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch or a pit-fall dug by its side. It is immaterial whether the injury results from falling debris, or descending into an open area.

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Murray vs. McShane.

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A special injury, from a public nuisance, is a conceded ground of action to the party hurt. "Two things" says Lord ELLENBOROUGH "must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Butterfield vs. Forrester*, 11 East, 60.

If, however the injury be such as could not have been avoided by the exercise of ordinary care, or was wantonly caused by the defendant, it would seem that the plaintiff, though negligent, is entitled to recover. *Bridge vs. The G. J. R. Co.*, 3 M. & W., 244; *Angell on Highways*, 347, and authorities in note 3.

Highways, are but easements over the land, leaving the fee in the owner of the adjacent soil, subject to the public servitudes. The person in whom the fee of the road is, may maintain trespass, or ejectment, or waste for the invasion of his rights. Yet, the traveller has corresponding privileges in the adjacent soil. A passenger on a public highway, may go "*extra viam*" if it be impassable. *Douglas R.*, 745; 3 *Stephens' N. P.*, Title, Way, 2768; 2 *Black. Com.*, note 26 by Christian.

The principle of this rule must extend to all other cases of necessity, which may overtake a traveller or passenger in a public thoroughfare, whether they arise from the state of the road, from persons, vehicles or property driven or carried over it, or from the personal wants of the passenger. He cannot stop in the highway, for that would impede others, and expose himself and them to danger.

Self-preservation, as well as public convenience, must justify, or make lawful, a temporary use of a fence, wall, or door-sill, binding on the highway, in cases of accident, or sudden sickness, or personal infirmity, not delaying longer than absolute necessity requires.

This appears negatively, from what was said by WILLARD, J., in the case of *Adams vs. Rivers*, 11 Barbour,

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Murray vs. McShane.

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390, cited in *Angell on Highways*. Trespass was brought by the adjoining owner, against a person who came upon the sidewalk, and there remained abusing him and refusing to depart. The learned Judge said, "the defendant committed a trespass while standing on the sidewalk by the plaintiff's lot, where he lived, and using towards him abusive language. While so engaged, he was not using the highway for the purpose for which it was designed, but was a trespasser. He stood there but about five minutes. It was not shown that he stopped on the sidewalk for a justifiable cause; on the contrary, it was rendered probable, that it was for a base and wicked purpose. It was, therefore, a trespass."

The "*locus in quo*" in that case, was the sidewalk, itself a part of the highway, but the right of action arose from its being used for an unlawful purpose. The alleged "*locus in quo*," in this case, is partly in the highway, and partly on the property of the adjoining owner, the head of the plaintiff, which was injured, being within the lines of the highway, as alleged, and the body resting for a lawful purpose on the door-sill. He was not a trespasser "*quoad hoc*;" if he had remained in that position longer than necessary against the owner's will, he might have become so.

We think the amended *narr.* set out a good cause of action, and, that the demurrer thereto should have been overruled.

*Judgment reversed, and  
new trial ordered.*

(Decided 20th June, 1879.)

THE JOHNS HOPKINS UNIVERSITY *vs.* GEORGE HAWKINS WILLIAMS, Executor of HENRY WILLIS BAXLEY, and CLAUDE BAXLEY and ISAAC R. BAXLEY.

*Lease construed to be a Security for the payment of money—  
Proceeds of sale of Real estate, held to be Personal property.*

On the 26th of August, 1865, B. sold to C. and P. a tract of land for \$54,607; of which \$29,607 was to be paid in cash, and the balance, \$25,000 was to be paid in five years, with interest on said sum, payable semi-annually. B. agreed to execute to any person purchasing a part of said land from C. and P. to the value of \$5000, a conveyance of such aliquot part of said land, upon the payment to him by C. and P. of such sum. B. further agreed to consummate the sale as soon as the proper papers could be prepared; and that his wife would unite therein for the purpose of releasing her dower. The cash portion of the purchase money was paid. On the 22nd of September, 1865, B. and wife leased to C. and P. the same tract of land for five years, upon the payment of the yearly sum of fifteen hundred dollars, as rent, in half-yearly instalments, with a covenant in the lease on the part of B. to convey to C. and P. the reversion at any time within five years upon the payment by them of \$25,000. Shortly after the execution of the lease B. went to Europe, and continued to reside there for several years after the expiration of the time within which C. and P. had the right to purchase the reversion. It was in proof, however, that B. was willing to accept the payment of \$25,000, both during and after the expiration of the term, and to convey the same to C. and P. in fee, but the latter insisted that the wife of B. should join in the conveyance; but this, owing to the relations then existing between him and his wife, B. refused to procure. P. assigned his interest in the land to C., his co-purchaser and co-lessee, who subsequently died, leaving a last will. The credit payment of \$25,000 with interest, by consent of all the parties in interest, was paid by the executors of C. to the executor of B. On a bill filed by the executor of B. to have determined the respective rights of the parties in interest, it was HELD:

Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

That the lease should be considered as a mere security for the payment of the \$25,000, part of the purchase money, and this sum, together with the interest thereon paid by the executors of C. to the executor of B., must be considered as personal estate, to be distributed as such.

APPEAL from the Circuit Court of Baltimore City.

The bill in this case was filed by George Hawkins Williams, executor of Henry Willis Baxley, deceased. The Johns Hopkins University, Claude Baxley, and Isaac R. Baxley in his own right and as executor of his mother Mary Virginia Baxley, were made defendants. The defendants were the parties interested in the estate of Henry Willis Baxley. The object of the bill was to have the Court determine the rights of the parties in interest, to the sum of \$28,375, received by the complainant as executor of Henry Willis Baxley, from the executors of Philip S. Chappell, deceased, and to have such rights established and decreed, and the fund distributed accordingly. After the execution and delivery of the lease referred to in the opinion of this Court, Allston A. Perry conveyed all his interest in the land, to his co-purchaser and co-lessee, Philip S. Chappell. Subsequently Chappell departed this life, leaving a last will and testament which was duly admitted to probate, and letters testamentary on his estate were granted to the persons named in said will as executors thereof. The case is further stated in the opinion of this Court. The Circuit Court decreed that the fund was personal property, and was to be disposed of as such in the settlement of the estate of Henry Willis Baxley, deceased, and distributed by his executor under the order of the Court; and that the papers be referred to the auditor to state an account in conformity with the decree, From this decree The Johns Hopkins University appealed.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON and IRVING, J.

Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

*Charles J. M. Gwinn, Attorney-General*, for the appellant.

The agreement in question was a binding contract for the sale of land, capable of being enforced. The effect of such agreement is stated with great precision and clearness by Lord WESTBURY, in *Rose vs. Watson*, 10 *H. of L. Cases*, 678. The ownership of the land sold was transferred by the agreement of August 26th, 1865, subject to the payment of the purchase money. Every portion of the purchase money for such land, paid in pursuance of that contract, was a part-performance and execution of that contract. To the extent of the purchase money so paid, equity transferred to the purchaser the ownership of a corresponding portion of the land. It did no more than this.

Under this theory of the law Chappell and Perry acquired the ownership of the land which they paid for. If they paid all of the purchase money, except \$25,000, they acquired the ownership of all the land sold, except land of the value of \$25,000.

If this agreement had remained operative, the land would have become, in equity, the property of Chappell and Perry; and the purchase money agreed to be paid would alone have belonged to Baxley. *Adams' Equity*, (3rd Am. Ed.,) 339; *Hall vs. Jones*, 21 *Md.*, 446.

The transaction, however, was not left in this form. It is alleged in the bill of complaint that, at the instance and request of the said Chappell and Perry, the contract of sale, evidenced by the agreement referred to, was subsequently "changed into a lease." This lease was not executed in pursuance of any agreement contained in the original contract. It was a new and very different arrangement. Under the new arrangement the contract was entirely changed.

Chappell and Perry, the lessees, were released from their obligation to pay \$25,000 within a period of five years from August 26th, 1865, or within any period of five years.



Johns Hopkins University vs. Williams, Ex'r, et al.

They ceased to be debtors of this sum of money. They became only lessees of the property for a period of five years, with the right, "*during the expiration of said term of five years,*" to claim a conveyance of the land on the payment of \$25,000, and of all rent in arrear, and of a proportion of the accruing rents.

The money which they had paid under the agreement of August 26th, 1865, was no longer a part of the money stipulated to be paid for the entire fee. A part of the money which had been paid under that agreement became evidently a new consideration for a grant of the lease for five years, at a rent of fifteen hundred dollars, and for the release of the obligation to pay the remaining part of the purchase money within the time prescribed in the agreement, and for the substitution, in lieu of such obligation, of an *option* only to purchase the property within a limited period.

Under this new arrangement, Chappell and Perry did not become, in equity, the owners of any part of the fee of the land. They acquired a leasehold interest only, with an option to purchase the reversion of said land, or of parts of said land, upon making certain aggregate or proportional payments within a prescribed time.

If they did not exercise their right of purchase, then, upon the expiration of their term, Baxley, as owner of the fee, would have had a right to re-enter upon the demised premises, but would have had no power to enforce any sale of such premises, for, under the new contract, nothing could become due to Baxley, unless Chappell and Perry elected to become his debtors by purchasing the reversion.

These essential differences between the transactions of August 26, 1865, and September 22nd, 1865, show, we repeat, that the transaction of September 22nd, 1865, was not a sale of the land, but only a lease of the land, with a right to Chappell and Perry, the lessees, to purchase the reversion of the land within a certain period. The period

Johns Hopkins University vs. Williams, Ex'r, et al.

expressed in the lease was "*during the expiration of said term of five years.*" It might very properly be said that the contract expressed in these words was incurably uncertain, and that no option of purchase of the reversion was reserved to Chappell and Perry by this lease. 2 *Parsons on Contracts*, (5th Ed.,) 561, 565, 566.

But if the Court should be of the opinion that the uncertainty thus existing was an ambiguity arising simply from an imperfect expression of the meaning of the party, which ought to be resolved by reference to the general context of the instrument, and there be words in the context capable of affording the desired solution, then it is plain that the words "*during the expiration of the said term of five years,*" can only be read "*prior to the expiration of said term of five years.*" These are the only words which can be supplied by the context of the instrument. They occur in the next succeeding covenant in the lease to that one in which ambiguity exists.

If the effect of the contract of sale, of August 26th, 1865, was to convert into personalty, so far as Baxley and those claiming under him were concerned, the land agreed to be sold to Chappell and Perry, then, unquestionably, the new arrangement, made by the lease of September 22nd, 1865, rescinded the contract of August 26th, 1865; and, by restoring to Baxley the entire equitable fee in the land, reconverted his interest in the land into realty.

Baxley, therefore, died, leaving his interest in the land referred to in the lease of September 22nd, 1865, stamped with the qualities of realty. No Court, it would seem, can properly interfere to change the quality of property left by a deceased owner, unless such deceased owner has manifested an absolute intention that such property should bear a character different from that in which it was left. 2 *Story's Eq. Jurisp.*, sec. 1214. The record affords no evidence of any such absolute intention. It cannot be deduced from the option to purchase, given by the lease of September 22nd, 1865.

Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

The option given to the lessees to purchase the land, if it was valid, was an option which was required to be exercised prior to the expiration of five years.

The grant of this option by the contract of lease did not convert the realty into personalty. It is settled law that property cannot be considered as converted from realty to personalty by a contract, unless the contract relied on as effecting such conversion is capable of being enforced by a bill for specific performance. When such specific performance cannot be enforced under such contract, then no conversion has taken place. *Haynes vs. Haynes*, 1 *Drew & Smale*, 451, 452; *Edwards vs. West*, 7 *Ch. Div. (L. R.)* 861-864; *Laws vs. Bennett*, 1 *Cox*, 167.

Now no contract can be enforced by a bill for specific performance, unless it can be enforced specifically against both parties to such contract. *Geiger vs. Green*, 4 *Gill*, 472; *Tyson vs. Watts*, 7 *Gill*, 154; *Rider & Trotter vs. Gray*, 10 *Md.*, 298. And as the contract for the option referred to could not have been in any way specifically enforced against Chappell and Perry, parties to that contract, it would seem to follow, conclusively, that the option to purchase, reserved in that contract to Chappell and Perry, did not convert the land leased into personalty, but left the reversion in that land, when the time for the exercise of the option had expired, ineffaceably impressed with its natural character of realty.

The instrument, dated September 22nd, 1865, could not be treated as security for the unpaid purchase money under the laws of this State, because no affidavit was endorsed thereon, before the recording of said mortgage, that the consideration therein stated was true and *bona fide*. 1 *Code*, Art. 24, sec. 29.

The most favorable view to the case of the appellees is that the deed of September 22nd, 1865, was a conditional sale. If it were a conditional sale, time certainly was of the essence of the contract. The character of the trans-

Johns Hopkins University *vs.* Williams, Ex'r, *et al*,

action was fixed at its inception. Any other construction of the contract than one which made time the essence of the contract, would have been, as we have seen, gravely detrimental to the interests of Baxley, and must be avoided.

There is no circumstance in the record from which the inference can be properly drawn, that Baxley waived the element of time which was the essence of the contract of September 22nd, 1865.

The option given to the lessees to purchase the land was not duly exercised. The interest of Baxley in the land when he died was in the nature of realty. The moneys, therefore, which were received by the complainant as executor, from Chappell for the fee of said land, were the proceeds of the sale of the fee of said land. These moneys were impressed, when so received, with the character of real estate.

*F. H. Hack* and *Charles Marshall*, for the appellees.

On the 22nd of September the last part of the cash payment for the farm was made, and on the [same day to secure the balance of \$25,000 a lease was executed, providing for the payment of a semi-annual rent of \$750—on the 26th days of August and February;—the 26th day of August being the date of the sale of the property, and the contract of sale stipulating, as the lease, for the payment of semi-annual sums of \$750.

The lease further provides that the lessor would execute a deed in fee simple to the lessees on the payment of \$25,000, with accrued rent, any time “during the expiration of the lease” but not before. Evidently the word “after” before “expiration of five years,” was intended:—the error is apparent.

To ascertain the interpretation of the lease and of the intention of the parties, we have only to regard their acts.

First, in the sworn petition of Mr. Williams, executor, to the Orphans' Court, it is stated that Chappell's repre-

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Johns Hopkins University *vs.* Williams, Ex'r. *et al.*

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sentatives claimed that the contract of sale remained in force after the expiration of the lease notwithstanding its form—and that Baxley was always willing to receive the balance of money and execute a deed in fee simple, and that the same was in part frustrated by his death.

Again it appears from the record, that in 1867, during the running of the lease, Baxley requested the lessees to pay to Mr. Williams the semi-annual interest on deferred payment for farm, due February 26th, 1867. Again, he requested them to pay to Mr. Williams—“*My attorney*, the \$750 interest due this date, August 26th, 1867.” And so in all his directions he requests the interest shall be paid and in the receipt, dated April 8th, 1871—*after the expiration* of the lease—the words “for interest” are inserted.

All parties evidently considered the \$25,000 secured by the lease as only a loan of money, or as a “deferred payment” as it was termed by the testator under whom the appellant claims.

If the lease had been made for ninety-nine years with a clause for redemption in five years instead of, as it is, a lease for five years only, there may have been some force in the argument that it became an absolute fee in Baxley at the end of five years.

Courts will prefer a construction of a contract consistent with the acts of the parties, to one which requires a forced, unreasonable and absurd construction.

The right of the vendor, Baxley, in the land had been extinguished, except for the \$25,000, for which he had a lien, and which he secured by a lease. This was the case the moment he signed the contract of sale and received the cash payments.

The original contract is silent as to how the balance of \$25,000 is to be secured; it might have contained a stipulation that the security should be a lease for five years, or a mortgage; but the parties selecting a lease to carry out a part of the contract, it is assumed, destroys that contract.

Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

There is nothing whatever in the lease inconsistent with the contract; on the contrary it is almost substantially identical.

The vendor's lien remained undestroyed—the lease was simply to secure it in a convenient form, and to give the right of distraint for the rent.

No doubt Baxley would have had a lease for ninety-nine years, redeemable in five years, by the payment of \$25,000, had his right in the land or control over it extended beyond five years; but the original contract had limited his interest to collect interest during five years, and then to enforce his lien. And at the expiration of the lease the contract again came in force; Baxley merely loaned the \$25,000 to the lessees for five years—at \$1500 per annum. When that expired, the lease having never been rescinded, the original contract came in force again, and Chappell continued to pay interest, and Baxley to receive it under that contract, the receipts were always for interest; the lease having expired, all the rights of the parties were to be ascertained by the contract. This construction is to be preferred, because

1. It leads to no improbable or unreasonable consequences.
2. It is consistent with the construction and acts of the parties, who all finally joined in making Chappell's representatives a deed on the payment of the balance of \$25,000.

We therefore think it beyond doubt that the lease was simply a security for money due Baxley, and that as it has been paid to Baxley's executor—it is distributable by him as personalty. A simple contract, not under seal, is never merged or destroyed by a specialty, when the latter is incidental to the former, or is intended as security. 14 *Johnson*, 404; 17 *Maine*, 113; 1 *S. & R.*, 294; 69 *E. C. L. Rep.*, 20; *Smith on Contracts*, 23-24.

Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

At Baxley's death there was a valid contract of sale, converting his land into money, and as such it is distributable.

In the case of *Banks vs. Haskie*, 45 Md., 207, a question arose similar in principle to this. In that case there was a lease for ninety-nine years with an option of renewal, which the lessee did not exercise during or at the expiration of the lease. There was no obligation on the lessee to take a new lease, whilst there was on the part of the lessor to give one. The lease having expired the Court held the obligation to renew was still binding on the lessor, though there was no mutuality of obligation.

ROBINSON, J., delivered the opinion of the Court.

The question in this appeal is whether the sum of \$28,375, paid to George H. Williams as executor of Henry W. Baxley, by the executors of Philip S. Chappell, is to be treated as real or personal estate?

It appears that Baxley sold to Philip S. Chappell and Allston A. Perry the land from which the money in question was ultimately derived, for \$54,607—\$29,607 was to be paid in cash, and the remaining \$25,000 in five years, with interest on said sum payable semi-annually.

Baxley also agreed to execute to any person purchasing a part of said land from Chappell and Perry to the value of \$5000, a conveyance of such aliquot part of said land upon the payment of such sum to him by Chappell and Perry.

The agreement further set forth an undertaking that Baxley would consummate the sale as soon as the proper papers could be prepared; and that his wife would unite therein for the purpose of releasing her dower.

The agreement was dated August 26th, 1865, and the credits upon it show the payment by Chappell and Perry of \$29,607.

The agreement thus executed became a binding contract for the sale of land, capable of being enforced. Under it,

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Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

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Chappell and Perry would be treated in equity as the owners of the land, and Baxley would be treated as the owner of the money due on the purchase. As purchasers they could have devised it as land even before a conveyance, or in case of intestacy, it would have descended to their heirs-at-law. *Rose vs. Watson*, 10 *House of Lords Cases*, 678; *Seton vs. Slade*, 7 *Vesey*, 264-274; *Story's Equity Jurisprudence*, sec. 790.

On the other hand the \$25,000 balance of purchase money belonged to Baxley, and upon his death would have formed a part of his personal estate.

This we understand to be conceded by the counsel for the appellant.

It appears however that on the 22nd of September following, Baxley and wife leased to Chappell and Perry the same tract of land for five years upon the payment of the yearly sum of fifteen hundred dollars as rent, the same to be paid semi-annually, with a covenant in the lease on the part of Baxley to convey to the lessees the reversion at any time within five years, upon the payment by them of \$25,000.

Shortly after the execution of the lease, Baxley went to Europe, and continued to reside there for several years after the expiration of the time within which the lessees had the right to purchase the reversion. It appears, however by the proof, that Baxley was willing to accept the payment of the \$25,000, both during and after the expiration of the term, and to convey the same to the lessees in fee, but the latter insisted that his wife should join in the conveyance; and this, owing to the relations then existing between him and his wife, Baxley refused to procure.

It is now contended, that by the execution of the lease, the ownership in the land which Chappell and Perry acquired under their purchase of August 26th, was surrendered; and that they are no longer to be treated in equity, as the owners of the property and entitled to a



Johns Hopkins University *vs.* Williams, Ex'r, *et al.*

conveyance of the same upon the payment of the balance of the purchase money, but are merely lessees, with the privilege of purchasing the reversion at any time within five years upon the payment of \$25,000. And that Baxley is to be treated as being no longer entitled to the balance of the purchase money under the original agreement, but as the owner, in fact, of the fee. And that the money which was paid by Chappell's executors to the executor of Baxley, with the consent of all parties interested, must therefore be treated as *personal* estate.

Now if this question depended solely upon the face of the lease, there might be some ground to support this contention.

But no question is better settled, than that in cases of this kind, Courts of equity will regard the substance and not the mere form of agreements and other instruments, and will give them the precise effect which the parties intended, no matter how or in what form, that intention may be expressed. So the question then resolves itself into this, did the parties, by the execution of the lease of September 22nd, mean to surrender the rights acquired respectively by them, under the original agreement of the 26th of August? And in considering this question, it does strike us, to say the least of it, as unreasonable to suppose that Chappell and Perry, after having purchased a valuable tract of land near the City of Baltimore for the sum of \$54,000, and after having paid \$29,000 on account of the same, and being entitled to a conveyance in fee, upon the payment of \$25,000, the balance of the purchase money, should within a few weeks afterwards agree to surrender all their rights thus acquired; and in lieu thereof, to accept a lease of the same property for five years, upon the payment of a yearly rent of fifteen hundred dollars, with the privilege of purchasing the reversion within that time, upon the payment of \$25,000. The record entirely fails to show any consideration or inducement on their part to sustain this construction of the lease.

*Johns Hopkins University vs. Williams, Ex'r, et al.*

But we are not left to the reasonableness or unreasonableness of the acts of the parties for the purpose of ascertaining their intention. Their declarations and admissions, both oral and written, show conclusively that all the parties to the lease of September 22nd, regarded it merely as security for the payment on the part of Chappell and Perry of the \$25,000, the balance of purchase money due on the agreement of August 26th.

The testimony of the attorney, confidential friend and executor of Baxley, shows that the latter was willing at any time after the expiration of the term limited by the lease, to accept the payment of \$25,000, and to execute a conveyance of the fee to Chappell and Perry. If the latter had no interest in the property except under the lease, and they had by their own default forfeited the right to purchase the reversion within the time limited, it is strange that Baxley should be willing to convey to them property worth \$54,000 for the sum of \$25,000.

But in addition to this, we have the written declarations of Baxley himself, that he considered the lease merely as a security for the payment of the \$25,000, balance due on the purchase of August 26th.

In his draft on Chappell and Perry for the payment of the half year's rent under the lease, he says:

"Pay to George H. Williams, Esq., attorney, seven hundred and fifty dollars, semi-annual interest on deferred payment for farm due February 26th, 1867." Then again by his draft of August 26th, 1868, he speaks of it "as semi-annual interest due upon farm in Baltimore County purchased of me." And then in a subsequent draft as interest "payable on account of credit purchase of Baltimore County farm."

There is no claim or demand for rent due under the lease, but in each draft the demand is for interest due by Chappell and Perry on account of purchase money.

Hiss and Wife, *et al.* vs. Balto. and Hampden Pass. Railway Co., *et al.*

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We are of opinion, therefore, that the lease must be considered as a mere security for the payment of the \$25,000, due by Chappell and Perry under the purchase of August 26th, and that this amount, together with the interest thereon paid by Chappell's executors to the executor of Baxley, must be considered as personal estate to be distributed as such.

*Decree affirmed.*

(Decided 20th June, 1879.)

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PHILIP HANSON HISS, and SUSAN HISS, his Wife, and others vs. THE BALTIMORE AND HAMPDEN PASSENGER RAILWAY COMPANY, and others.

*Question whether an Act of the Legislature authorizing the construction of a Horse car railway on a Street or avenue in Baltimore County, being an Extension of one of the Streets of Baltimore City, was Constitutional? and whether said street was a public Highway? Where the rights exercised under said Act are Constitutional they will not be held illegal because the language of the Act covers other rights not within the scope of the Legislative power—Matters arising subsequent to the filing of the Bill and not made the subject of a Supplemental bill, cannot be noticed on Appeal—Forfeiture of Charter.*

The complainants in their bill, alleged, that they were the owners of lots abutting upon D. street or M. avenue, between S. and B. streets in Baltimore County; that the bed of said street or avenue belonged to them, and that the same was a private way. That the defendants without their assent, and claiming incorporation under, and authority by, the Act of 1865, ch. 32, were laying a railway track along said street or avenue to the complainants' injury, without having condemned the right of way, or made any

Hiss and Wife, *et al. vs.* Balto. and Hampden Pass. Railway Co., *et al.*

compensation to them for their interest in the soil and the damages incurred. The bill then prayed for an injunction. The answer admitted the complainants' title, but denied that the said street was a private way, and charged it to be a public street or highway, and a very important thoroughfare. It admitted the laying of the railway track, but alleged it was only a horse car railway, which their charter fully authorized, and the defendants disavowed and forever renounced all claim to place a steam railway on said street, and insisted, that the law was wholly within legislative powers. The admissions and proof, showed, that the street or avenue in question had been thrown open to public use, and had been accepted and used by the public for many years; that lots had been sold calling for said street, and that it had been used for many years as a thoroughfare for all the ordinary modes of transit. **HELD:**

- 1st. That the complainants were estopped from denying it was such street or highway for all the purposes for which it might be fairly inferred that the dedication was intended.
- 2nd. That the Legislature had the power to confer upon the defendants the right to construct and use a horse car railway on said street.
- 3rd. That it was not necessary to determine whether under said Act of 1865, ch. 32, a steam railway, if attempted to be laid, would be without sufficient legal warrant, as the defendants were not laying claim to any such right, but were building a horse car railway only, and renounced all claim to lay any other.
- 4th. That it did not necessarily follow that said Act was wholly unconstitutional because something may be attempted under it, and may in the broad language of the Act seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction which will justify that which was being done under it, and which by the terms of the law was clearly warranted by it, to that extent the law ought to be sustained.
- 5th. That the terms of the Act included the right to build a horse car railway, and such railway along a public street or highway, is not a new and additional servitude on the land.

After the filing of the bill, the time within which, by the terms of the Act of 1865, ch. 32, the defendant was required to complete its road, expired. No supplemental bill was filed suggesting that as an additional reason for the injunction, and subsequent to its expiration the commission to take testimony was issued and executed, and the bill was dismissed by consent *pro forma* for the purpose of an appeal. **HELD:**

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

- 1st. That under such circumstances, this Court on review must consider all the proceedings as relating to the time of filing the bill, and decide the cause according to the actual rights of the defendants at the time they were, at the instance of the complainants, arrested by injunction from proceeding with a work which was then legitimately authorized.
- 2nd. That the injunction granted originally on the complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct.
- 3rd. That to hold otherwise on this point would in effect be declaring a forfeiture of the defendant's charter in an incidental way, without any proceedings instituted for that purpose.

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*Bernard Carter*, for the appellants.

If the Act of 1865, ch. 32, sec. 6, authorizes the appellee, the Railway Company, to construct its road upon Maryland avenue, in front of the property of the appellants, without acquiring by grant or condemnation the right to do so, it is in this respect unconstitutional.

We make no question as to the law laid down in the cases of *White vs. Flannigan*, 1 Md., 525, and *Moale vs. Mayor and City Council of Baltimore*, 5 Md., 314. But these cases do not establish the right of the Railway Company to lay its tracks on Maryland avenue in front of our property without condemnation or grant of the right.

These cases are expressly confined by the decisions in them to conveyances of lots in the city, which call for streets in the city, and have no application to conveyances in the county binding on roads.

Hiss and Wife, et al. vs. Balto. and Hampden Pass. Railway Co., et al.

And it will be seen that in the case of *Moale vs. Mayor and City Council of Baltimore*, 5 Md., 314, it was conceded that there must be condemnation of the street, though it is said that the damages awarded would be nominal, that is damages for condemnation of it as a *street*.

When the question of dedication is considered therefore, to learn to what extent the dedication goes, we are to look to the uses designed to be made at the time of dedication, and the dedication goes no further. *City of Cincinnati vs. White's Lessee*, 6 Peters, 432.

Where a road, or avenue, is laid out in the county by private owners, though permissively open to the public to drive and ride over, the owners of property binding upon such road own the fee to the centre of the road, and the public have at the most only the right to make such use of it as was designed at the time it was so thrown open to the public, and this does not give the Legislature the right to grant to any corporation the right to lay down railroad tracks, or make any other such use of the road, without the grant of such right from the co-terminous proprietors, or by acquiring such right by condemnation. 22 *Vermont*, 484, 495; 3 *Kent*, 433; *Presby. Soc. vs. Auburn & Rochester R. R.*, (NELSON, CH. J.) 3 *Hill*, 568; *Williams vs. N. J. R. R.*, 16 *N. Y.*, 116; *Stetson vs. Chicago R. R.*, 75 *Ill.*, 74; *Cox vs. Louisville R. R.*, 48 *Ind.*, 178; *Gray vs. St. Paul R. R.*, 13 *Minnesota*, 315, 318, 320; *Cooley on Constl. Lim.*, 546-556.

The application of the case of *Peddicord vs. Balto. & Catonsville R. R.*, 34 Md., 480, was expressly limited to the facts of that case, and there the right of way has been condemned by the Turnpike Co. This case, therefore, is no authority for the facts of the case now before the Court; whereas all that the evidence shows as to dedication is that the public were permitted to ride and drive over the road, which is *proved* to have been carried out by Mr. Smith himself.

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

But by the true construction of the 6th sec. of the Act of 1865, ch. 32, it was not intended by the Legislature to give the Railway Company the right to use the roads and streets therein mentioned, without first obtaining the assent of the property-holders binding thereon. The only design was to confer the right so far as the *public easement* was concerned, leaving the Company to deal with the private rights of individuals in the usual way. *Gray vs. St. Paul R. R.*, 13 *Minnesota*, 315, 318, 320; *Presby. Soc. vs. Auburn & Rochester R. R.*, 3 *Hill*, 569; *Williams vs. N. J. R. R.*, 16 *N. Y.*, 111; *Williams vs. Nat. B. P. R.*, 21 *Missouri*, 583, 584; *Balt. & Havre-de-Grace Turnpike Co. vs. Union R. R. Co.*, 35 *Md.*, 231.

In the absence of such a section the right to use the roads and streets would not have been implied. *Springfield vs. Conn. R. R. Co.*, 4 *Cushing*, 63. Hence the section.

By the Acts of 1865, ch. 32, and 1868, ch. 121, the Company has no right to do any work necessary to complete the road after January 1, 1878. *Regina vs. London, &c., R. R.*, 6 *Eng. Law and Eq.*, 220; *Plymouth R. Co. vs. Caldwell*, 39 *Pa.*, 340, 341; 1 *Red. on R.*, 393; *Peavy vs. Calais R. R.*, 30 *Maine*, 501; 1 *Red., on Railways*, 239, 240.

Therefore, the injunction should have been granted instead of the bill being dismissed.

On the question of jurisdiction, see *Mayor, &c., of Balt. vs. Appold*, 42 *Md.*, 442.

*L. L. Conrad* and *D. G. McIntosh*, for the appellees.

Maryland avenue lies in Baltimore County, and runs from the north side of North avenue, northward to Huntington avenue, also in Baltimore County. North avenue is the northern boundary of Baltimore City, and both that and Huntington avenue are admittedly public streets.

Across Maryland avenue, at right angles with it, between North avenue and Huntington avenue, run a series

Hiss and Wife, et al. vs. Balto. and Hampden Pass. Railway Co., et al.

of cross streets, which in this order northward are known as Denmead, Mankin, Brown, Shirk and Sumwalt streets. Maryland avenue between Mankin and Sumwalt streets, three squares, is the part of Maryland avenue in controversy in this case.

Maryland avenue has become a public way by derivation from two sources.

1st. Dedication.

2nd. By virtue of certain proceedings taken by the County Commissioners under the Act of 1874, ch. 441.

Dedication is defined to be an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public. The interest which the public thus acquires, is merely an easement or right of passage over the soil. *Angell on Highways*, sec. 132.

No particular formality is required to create a dedication. It may be made either with or without writing, by any act of the owner, such as throwing open his land to the public travel or platting it, and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate, or an acquiescence in the use of his land for a highway; or his declared assent to such use will be sufficient. The vital principle of dedication is the intention to dedicate, and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. *Time*, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the *act* of dedication be unequivocal, it may take place *immediately*; for instance, if a man builds a double row of houses, opening into an ancient street at each end, and sells or lets the houses, that is *instantly* a highway. If accepted, and used by the public in the manner intended, the dedication is complete. Dedication, therefore, is a conclusion of fact to be drawn from the circumstances of



Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

such particular case; the sole question as against the owner of the soil being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public as a highway. *Angell on Highways*, sec. 142.

Dedication to the public use may arise out of a variety of facts and circumstances, which in some cases exist separately, and in others concurrently. In the case at bar almost every form, certainly all the ordinary and usual forms of fact and circumstances which have been held to create a dedication, will be found to exist. *White vs. Flannigan*, 1 Md., 540; *Parker, et al. vs. Smith*, 17 Mass., 415; *Moale vs. Mayor and City Council*, 5 Md., 323; *Hawley vs. Mayor and City Council*, 33 Md., 280.

So dedication may arise out of other circumstances. In *Rex vs. Lloyd*, Lord ELLENBOROUGH said "If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." *Rex vs. Lloyd*, 1 Campb., 262; *Surrey Canal Co. vs. Hall*, 1 Scott's New Rep., 264—reported also in *Manning & Granger's Rep.*, 392; *Regina vs. Petrie*, 4 Ellis & Blackburn, 743, (*marginal page*;) *Jarvis vs. Dean*, 3 Bingham, 448.

Assuming, therefore, as established, that Maryland avenue, by dedication and otherwise, is, and was, a public street, avenue, or road, of Baltimore County in Baltimore County, the only remaining question presented is, whether the respondent company had power, under its charter, to lay down its tracks thereon. The answer to this question is contained in sec. 6 of the Act of 1865, ch. 32. The power there granted is of the most absolute and unrestricted character. No assent of the County Commissioners is required, or other formality. As regards "branches or lateral railways," contemplated by sec. 8, the assent of the County Commissioners is required, but not as regards the main track.

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

But were it otherwise, the complainants have no standing which entitles them to contest the company's performance of its duty, or its violation of its rights, under its charter, as respects the public highways of the county. The proper and only remedy in such a case is a criminal indictment against the company for obstructing the highway. The complainants, unless they can show special damage, distinct in degree and kind from that suffered by all other members of the community, (in which case an action on the case is their appropriate remedy,) have no civil remedy for the obstruction of the highway. *Houck vs. Wachter*, 34 Md., 269.

One claim made by complainants' bill is, that, even assuming the easement of Maryland avenue to be vested in the public, nevertheless that easement is restricted to the proper use of the avenue as a highway; that the use of said street by a passenger railway is a *new burden* laid on the easement; and, therefore, a violation of complainants' rights as owners of the naked fee of the bed of the street.

In reply to this claim, we refer the Court to the case of *Peddicord vs. Baltimore, Catonsville, &c. Railway*, 34 Md., 480; *Angell on Highways*, secs. 243, 245; 2 *Dillon on Corps.*, secs. 555, 557, 564, 566; 6 *Wharton*, 25; 27 *Penn. St.*, 339, 354; *High on Injunctions*, sec. 528; *Lansing vs. Smith*, 8 *Cowen*, 146.

In conclusion, we have only to add that Maryland avenue is situated in the midst of a populous community—is almost as numerously bordered by dwellings as Charles street; and if the complainants have, as they claim, a right to close it up or restrict its uses to their own benefit, other proprietors of lots along its line have fallen into a trap which they little dreamed to exist, in law or in fact, when they purchased the houses they occupy.

IRVING, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court for Baltimore County, dissolving an injunction and dismiss-

*Hiss and Wife, et al. vs. Balto. and Hampden Pass. Railway Co. et al.*

ing the bill of the appellants. The bill charges, that the appellants are the owners of the lots abutting upon Decker street or Maryland avenue, between Shirk and Brown streets, in Baltimore County; that the bed of said street or avenue belongs to the complainants, and that the same is a private way. It further charges, that the appellee, the Passenger Railway Company, without the assent of the complainants, and claiming incorporation under, and authority by, an Act of the Legislature passed in 1865, being chapter 32, is laying a railway track along said street or avenue to their injury, without having condemned the right of way or made any compensation to them for their interest in the soil and damages incurred; the bill then prays for an injunction. The answer admits title, but denies that the said street is a private way, and charges it to be a public street or highway, and a very important thoroughfare. It admits the laying of the railroad track, but alleges it is only a horse car railway, which their charter fully authorizes, and defendants disavow and forever renounce all claim to place a steam railway on said street, and insist that the law is wholly within legislative powers.

The case presents two questions. 1. Is Decker street or Maryland avenue a public street and highway? 2. Is the authority given the Railway Company by their charter, Act of 1865, ch. 32, constitutionally imparted? In other words, had the Legislature power to authorize the construction of such railroad in and along said street or highway?

1. From the admissions of record, the proof in the cause, and the concession at bar, it is clear that the street or avenue in question has been thrown open to public use, and has been accepted and used by the public for many years; that lots have been sold calling for said street; that it has been used for very many years as a thoroughfare for all the ordinary modes of transit; so that we regard the appellants as estopped from denying it is such street or highway, for all the purposes for which it may be fairly inferred, that the dedication was intended. *White vs.*

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

*Flannigan*, 1 *Md.*, 540; *Hawley, et al. vs. Mayor and City Council*, 33 *Md.*, 270; 6 *Peters*, 431.

2. Was the Act of 1865, ch. 32, within the scope of legislative authority? Has the Legislature imposed a new servitude on the appellants' land, and added a burden not contemplated in the dedication, or reasonably incident to its use as a highway? This is a question which has been much debated, and has been decided very differently in the various States.

Judge DILLON, in his work on *Municipal Corporations*, Vol. II, p. 675, (2nd Edition,) says that "the weight of judicial authority at present is that where the public have only an easement in streets, and the fee is retained by the adjacent owner, the Legislature cannot, under the constitutional guaranty of private property, authorize a steam railroad to be constructed thereon against the will of the adjoining owner, without compensation to him. In other words, such railway, as usually constructed and operated, is an additional servitude." He adds that as to horse car railroads it is mostly held that they "do not create a new burden, hence the Legislature is not bound to, though it may, provide for compensation to the adjoining proprietor."

Denying that such distinction ought to be drawn, and is the law here, the counsel for the appellants contends, that the Act of 1865, under which the appellees claim their authority, gives an unqualified right to build any kind of railway, and that as a steam railway may be constructed under that Act, the law could not be constitutionally passed; and is, therefore, void. It is not necessary for us to determine whether a steam railway, if attempted to be laid, would be without sufficient legal warrant, which Judge DILLON says, notwithstanding the preponderance of decisions, is "still the subject of fair debate;" for the appellees are not laying claim to any such right. On the contrary, they are building a horse car railway only, and renounce all claim to lay any other, and make that dis-

Hiss and Wife, *et al.* vs. Balto. and Hampden Pass. Railway Co., *et al.*

claimer a part of their answer that they may be forever bound thereby. It does not necessarily follow, that the Act is wholly unconstitutional because something may be attempted under it, and may, in the broad language of the Act, seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction that will justify that which is being done under it, and which, by the terms of the law, is clearly warranted by it, to that extent the law ought to be sustained. All intendments will be made in favor of the constitutionality of a statute, that is not necessarily, by its provisions, unconstitutional. If, in this case, that which the appellees are doing under their charter, is warranted by their charter, and within the power of the Legislature to authorize, they ought not to be enjoined. The terms of the Act are so broad, it is clear that it includes the right to build a horse-car railway. It is a case of the major, including the less. The question then recurs, is a horse car railway along a public street or highway a new and additional servitude on the land? It is well established, that a highway cannot be diverted, by the authority of the Legislature, or those who enjoy the easement, to other purposes than those for which it was dedicated or acquired; nor can it be so enlarged as to cumulate burdens on the land not reasonably contemplated in the dedication or condemnation. The theory upon which the Courts of Connecticut, New Jersey and Ohio, justify the use of public highways for laying horse car railways, is that the dedicator is presumed to have intended the highway to be used in such way by the public as would be most convenient and comfortable for travel, or doing any necessary work; and that any improved mode of using the road, for any of the contemplated objects and convenience, is not an invasion of the rights of the owner of the abutting land. It has been further held that to sustain a claim of intrusion on his rights such owner must show some injury other and different from that sustained

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

by the public generally, for whose use the roadway has been dedicated. *City R. R. Co. vs. C. R. R. Co.*, 20 *N. J.*, 61; 17 *N. J. Eq.*, 75; 14 *Ohio*, 523, and *Elliott vs. R. R. Co.*, 32 *Conn.*, 579.

Judge COOLEY draws a distinction between streets taken or dedicated for city or town purposes, and country highways. He thinks that a *street* is to be regarded for *all* the ordinary purposes of a street, not only as such as have been hitherto adopted, but those "demanded by new improvements and new wants," and includes within "new improvements and new wants," which the original dedication must have contemplated, grooved tracks for carriages, and regards them as "almost as much a matter of course as paving and grading." COOLEY'S *Constitutional Limitations*, 556. This distinction, if supported by authority, upon which we do not pass, cannot and ought not to apply in this case; for, although the way is not technically within the city limits, its location, in such near proximity thereto, as an entering way into the city and exit therefrom; and in fact, as an extension of one of the city streets it must, and ought to be regarded as subject to the same burdens in the way of use which would legitimately fall on the street, of which it is, at the place in question, only an extension. It is so near the city proper, and used in such way by the city people and others; that when it was formally dedicated many years ago, it was then called Decker street, in consequence of the mode of occupation of the adjacent property, and the rapidly extending limits of *quasi* city occupancy. Under such circumstances, it must be supposed the dedicator intended it to be liable to all the uses of city streets, one of which, it was so absolutely certain, that in the growth of the town, it would become. In *Peddicord's Case*, 34 *Md.*, 479, this Court, in passing upon the rights of the Catonsville Passenger R. R. under its contract with the Turnpike Company, say the use so granted does not, (in the language of the Court in

Hiss and Wife, *et al. vs. Balto. and Hampden Pass. Railway Co., et al.*

14 *Ohio*, 523,) "exclude or seriously interfere with the original modes in which the highway was used; but simply adds another in furtherance of the same general object." The effort to distinguish this case from *Peddycord's* is vain. It is true that in that case the R. R. Co. derived their powers by contract, from the Turnpike Company, who had secured the easement, by legislative aid, through purchase or condemnation. Still it was only an easement, as a highway, for the ordinary and usual uses of a turnpike, which the Turnpike Company had obtained, and if the Turnpike Company had the right, under its charter, to authorize the Catonsville R. R. Co. to lay such a track along its line or road, and such use by the R. R. Co. did not add a new servitude upon the road, as against the adjacent proprietor, surely the public have acquired in Decker street or Maryland avenue a right of as high grade as the said Turnpike Company secured. If that be so, then the Legislature, representing the public, may grant this right of improved use of the highway. Whenever a case shall arise wherein the right is claimed under that statute to build another kind of road it will be time enough to consider that as part of the question.

The only remaining question to be considered, is the point made by appellants' counsel, that because, when the decree was passed and the injunction dissolved, the time within which the appellees were to complete their work had expired, it was error in the Court to dismiss the bill and dissolve the injunction; and that then the injunction should have been made perpetual. Their time, it is contended, expired on the 1st day of January, 1878. No supplemental bill has been filed suggesting that as an additional reason for the injunction, and no proceeding below by which the point appears to have been raised. On the contrary, the case went to a commission for testimony, and all testimony was taken after the period named, and the bill was dismissed, by consent, *pro forma*, for the pur-

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Reiff, *et al.*, Trustees *vs.* Horst.

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pose of appeal. Under such circumstances, therefore, this Court on review, must consider all the proceedings as relating to the time of filing the bill, and decide the cause according to the actual rights of the parties appellees at the time they were arrested, at the instance of appellants, by injunction, from proceeding with a work, which we hereby hold, was then legitimately authorized. If by reason of the delays incident to the litigation, the appellees have lost their right to finish their work, it is their misfortune; but the appellants cannot maintain their appeal by reason of it. The injunction granted originally, on complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct. In addition to the reasons already assigned, it may be well to add, that to hold otherwise on this point would, in effect, be declaring a forfeiture of appellee's charter, in an incidental way, without any proceedings instituted for the purpose. We think the decree of the Circuit Court, dissolving the injunction and dismissing the bill, was right.

*Decree affirmed with costs.*

(Decided 15th July, 1879.)

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ISRAEL REIFF, JOHN HORST and DANIEL CEARFOSS,  
Trustees *vs.* SAMUEL E. HORST.

*Case of a declaration of Trust as to Money, established by Parol evidence—The effect of Contrariety in the Testimony of a witness to be weighed by the Jury.*

A. gave to his son-in-law B. the sum of \$400, and eleven years afterwards gave him an additional sum of \$2000, upon the verbal understanding and agreement between them, that B. should hold



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Reiff, *et al.*, Trustees *vs.* Horst.

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the latter sum, and also the sum of \$400, previously received, for the benefit of the grandchildren of A., (B's children) to be paid to them with interest. B. afterwards sold a farm to C., who was one of his children and grandchild of A., and agreed with him, that \$1000 of the purchase money should be allowed to stand in the farm as C's portion of the moneys A. had placed in B's hands. After the sale and conveyance of the farm, B. assigned to trustees for the benefit of his creditors all his property, including bonds, notes, *choses in action* and accounts, with power to sue for and recover the same. In an action brought by the trustees against C. to recover the \$1000, as an unpaid balance of the purchase money for said farm, it was HELD:

- 1st. That the character of a trust was impressed upon the sum of \$400 by the agreement of B., to hold that amount for the same purposes for which he received the \$2000 from his father-in-law, viz., in trust for his children.
- 2nd. That any contrariety between A's statements of the declarations of the trusts in his examination in chief, and in his cross-examination, were to be weighed by the jury, who were to determine how far his testimony was to be relied on.

APPEAL from the Circuit Court for Washington County.

The case is stated in the opinion of the Court.

*First Exception.*—At the trial the plaintiffs offered the following prayers:

1. If the jury find that in 1845 the sum of \$400 was obtained by Abraham Horst from Peter Eshleman, and that both parties treated the sum so given as a gift, and not as a loan or as a trust at that time; and that some eleven years afterwards the said Horst got the sum of \$2000 more, not as a loan, but as a fund, to be held in trust by him for his children; and then for the first time it was agreed and understood, that the \$400 previously given, should also be treated and held as in trust, the same as the \$2000, then the jury are instructed that these facts are insufficient to create a trust in the said \$400.

2. And if the jury find that in 1856, Abraham Horst received the sum of \$2000, as a fund or advancement to

him, to be held by him for the benefit of his wife during her life, and after her death to be divided among her children; and further find, that afterwards his wife died, then from the time of her death, and not before, the said fund was held in trust for her children; and if they find that the money was to be equally divided among the children, they will ascertain each child's share, with interest from the time of the mother's death down to March 25th, 1875, the date of the deed; and if they find that a sum of money greater than each child's share, was left in the farm bought in 1875, by the defendant from Abraham Horst, they will find for the plaintiffs the difference between what was each child's share as aforesaid, to March 25th, 1875, and the amount actually left in the farm, and unpaid by the defendant therein.

3. If the jury find from the evidence that the defendant purchased the farm mentioned by the witness, from his father, Abraham Horst, in March, 1875, for the sum of \$8600, and that about ten days or two weeks before said purchase, the defendant told the witness, John S. Horst, that he had been talking to his father about the purchase, and that he told his father that he would take the farm at \$8600, if he would leave \$1000 in it; and that after he had purchased the farm, and about the last of March, 1875, the defendant told the witness, John Frantz, that he had complained to his father that he had bought the farm too dear, and that his father had taken off \$1000; and that said Frantz asked the defendant whether he did not claim some money in that farm on account of his mother, and that the defendant answered only that he had complained to his father that the farm was too dear, and that his father had taken off \$1000; that the defendant, about one month after he had bought the farm, asked the witness, John Strite, whether he did not think that he had bought the farm too dear, at \$90 per acre, and Strite said no; and that the defendant then said to Strite,

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Reiff, *et al.*, Trustees *vs.* Horst.

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well, he leaves \$1000 stand; then there is evidence from which the jury may find that the \$1000 in controversy in this cause, was the money of Abraham Horst; and if the jury should further believe and find, that the said sum of \$1000, was the money of said Abraham Horst, and was so treated by the defendant and said Abraham Horst, at the time of the purchase, and that said Abraham Horst was then insolvent and unable to pay his debts, and that he executed the deed of July 10th, 1876, offered in evidence, then the plaintiffs are entitled to recover the sum of \$1000, and also interest thereon, in the discretion of the jury.

4. If the jury find that the farm mentioned in the deed read in evidence, was purchased by the defendant for \$8600, with the understanding that the vendor was to leave the sum of \$1000, as a debt due by the purchaser, remaining in the farm, and that the defendant took the farm on these terms, and has not paid the said sum of \$1000, and then find the execution of the deed of the 10th July, 1876, read in evidence, then the plaintiffs are entitled to the said sum of \$1000, with interest, in the discretion of the jury.

5. The jury are instructed that the evidence before them in relation to the sums of \$400 and \$2000, as detailed by Abraham Horst, and Samuel Horst, the defendant, are not sufficient to establish a trust, and did not create the said Abraham Horst a trustee of that fund for the benefit of his children. And if they find that the farm described in the deed of 25th March, 1875, was sold by Abraham Horst to the defendant for \$8600, and that the said sum of \$8600 has not been paid in full; and further find, that afterwards the said Abraham Horst made to the plaintiffs the deed of the 10th July, 1876, read in evidence, then the plaintiffs are entitled to recover in this action whatever sum of the said \$8600 was not paid by the defendant.

And the defendant offered the following prayers :

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Reiff, *et al.*, Trustees *vs.* Horst.

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1. If the jury believe that Abraham Horst and the defendant, before the assignment to the plaintiffs, entered into a parol or verbal agreement for the sale of the land to the defendant, and at the same time agreed that the said Abraham had in his hands \$1000 of the moneys of the defendant, as one of the grandchildren of Peter Eshleman, and that before the execution of the deed it was agreed between them that said \$1000 should be regarded as part payment of the purchase money for said land, and that in pursuance of that understanding and upon that condition, the defendant agreed to purchase and afterwards received the deed for the land; and shall further find, that all the purchase money has been paid by the defendant in accordance with their said agreement, considering said \$1000 as part payment, then the plaintiffs are not entitled to recover anything on account of purchase money for said land.

2. If the jury believe from the evidence that Peter Eshleman, in or about the year 1845, gave Abraham Horst, \$400, and afterwards, in the year 1856 gave the said Abraham \$2000 more, with an understanding and promise on the part of the said Abraham, and as a condition upon which he received the said \$2000, to pay the said sums of money, with interest thereon, to the children of the said Abraham, and who were the grandchildren of the said Peter Eshleman; and further believe that the said Abraham Horst, in a negotiation for the sale of a farm to the defendant, (who was one of the five children of the said Abraham, and one of the said grandchildren of the said Peter Eshleman, if the jury so find,) agreed and determined to allow, as part of the purchase money therefor, the sum of \$1000 as the defendant's share of said money, and the interest thereon, received as aforesaid from the said Peter Eshleman, and did so allow the said \$1000 in the purchase of the said farm in March, 1875, then the plaintiffs cannot recover the said \$1000 so allowed in this action.

Reiff, *et al.*, Trustees *vs.* Horst.

3. If the jury find from the evidence that Peter Eshleman gave to Abraham Horst the sum of \$400 in the year 1845, and the sum of \$2000 in the year 1856, and that when the said Abraham received the said last mentioned sum of money, he promised and agreed, as a condition upon which he received it, to pay both of said sums of money to his children, who were also the grandchildren of the said Peter Eshleman, and that the defendant is one of the said children, that then there was a moral obligation on the part of the said Abraham Horst to pay the defendant his part of the said money, with interest thereon, and the payment of the same was not fraudulent, even if they do believe that the said Abraham Horst was insolvent at the time he made the said payment.

4. If the jury believe that Abraham Horst gave or sold to the defendant a reaper in the year 1870, the plaintiffs cannot recover for the same in this cause, unless the jury further find from the evidence that the defendant promised to pay for the same within three years from the bringing of this suit.

The Court (MOTTER and PEARRE, J.) granted the third and fourth of the plaintiffs' prayers, and rejected their first, second and fifth, and granted the prayers of the defendant.

The plaintiffs excepted, and the verdict and judgment being against them, they appealed.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, and ROBINSON, J.

*Wm. Kealhofer*, for the appellants.

In order to the establishment of a trust, it is fundamental and elementary that the fiduciary words must be *imperative* on the trustee.

There must be no discretion in him to do or not to do the thing recommended or desired. Discretionary expres-

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Reiff, *et al.*, Trustees *vs.* Horst.

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sions which leave the application, or non-application of the subject, to the objects contemplated, entirely to the mere option or caprice of the alleged trustee, prevent a trust from attaching.

See second rule laid down by the editors of *Hill on Trustees*, 73, (4th Am. Ed.); also cited at third note, *Perry on Trustees*, sec. 114.

The question to be determined in this case, really is, whether the donor, Eshleman, intended to impose an obligation on Horst to carry out his wishes at all events; or whether having expressed his wishes or intentions, he nevertheless left it to Horst to act on them or not, at his discretion? If the latter, then no trust was created. *Perry on Trusts*, sec. 114; *Williams vs. Williams*, 1 Sim., (N. S.), 358; *Gilbert vs. Chapin*, 19 Con., 351; (cited sec. 113, *Perry on Trusts*.)

Abraham Horst had manifestly the option of spending this money, which he in fact did, and no effort was made by any one, even while he was in embarrassed circumstances, to secure the payment of it.

In the case of *Wyman vs. Hawkins*, 1 Brown's Ch. R., 179, the Lord Chancellor says: "Where it is uncertain what property is to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed, and where that does not appear the scale leans to the presumption that he meant to fix the whole to the first taker." *Harland vs. Trigg*, 1 Brown's Ch. R., 142; *Morris vs. The Bishop of Durham*, 10 Ves., 536; *Wright vs. Atkyns*, 1 Turner & Russ., (12 En. Ch. R.) 156.

"The subject-matter of the trust must be clearly ascertained as well as the purposes of the trust, and the persons who are to take the beneficial interests. Loose, vague and indefinite expressions are insufficient to create the trust." *Perry on Trusts*, sec. 86, p. 59.

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Reiff, *et al.*, Trustees *vs.* Horst.

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The appellants' first prayer ought to have been granted. It announces a single fundamental and elementary principle of law.

In 1845, Peter Eshleman gave to Mr. Horst \$400 absolutely, and without any qualification or conditions whatsoever. And Mr. Horst used it as his own. It was not possible to impress that fund with the charge of a trust. Because the declarations of the grantor to create a trust, must be prior to, or contemporaneous with the parting with the thing to be held in trust. For after he has parted with it, he cannot charge it with a trust any more than he can charge it with any other kind of encumbrance. *Brown vs. Brown*, 12 Md., 87; *Adlington vs. Coner*, 3 Atk., 145; *Perry on Trusts*, sec. 77; *Tiffany & Bullard*, 15.

If the trust as set up by Samuel Horst is invalid, and not sufficient in law, then the allowance of \$1000, on the sale of the farm by Abraham Horst, is without consideration, and his assignees have a right to recover that amount in this action, and the appellants' fifth prayer should have been granted. *Kipp vs. Hanna*, 2 Bland, 28; *Hoge vs. Penn*, 1 Bland, 28; *Somerville vs. Stanfield*, 28 Md., 211; *Shedes vs. Rogers*, 3 B. & Ad., 362; *Worthington vs. Bullitt*, 6 Md., 172.

*F. M. Darby* and *H. H. Keady*, for the appellee.

The trust of \$2400 was complete, and when Peter Eshleman, in 1856, gave Abraham Horst the \$2000, it was perfectly competent for them to agree that the \$400, which was given him in 1845, should be added by Abraham to the \$2000, making a fund of \$2400, which was to be held by Abraham for the benefit of his children, who were the grandchildren of Peter Eshleman. It was upon the condition that Abraham should add the \$400 to the \$2000 that Eshleman placed in his hands the \$2000, and Abraham accepted the \$2000 on that condition.

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Reiff, *et al.*, Trustees *vs.* Horst.

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As to the certainty and definiteness required to create a trust, see *Hill on Trustees*, 114, and notes; 1 *Perry on Trusts*, sec. 114; *Harrison vs. Harrison's Ex'r*, 2 *Gratt.*, 1.

The plaintiffs' first prayer was properly rejected, because Samuel E. Horst is not to be affected with the technical validity of the trust. He was assured the money was in his father's hands, and he entered into his contract upon the faith of that assurance. And also, because the prayer is not supported by the only evidence in the cause as to the \$400 being brought into the trust. Abraham Horst testifies, that in 1856, Peter Eshleman gave him \$2000 more, on the following *terms and conditions*, viz., "That he should hold the \$2000, and also the \$400 given eleven years before, for the benefit of the grandchildren of said Eshleman," &c.

The second and fifth prayers of the plaintiffs were also properly rejected, because they ignore the contract between Abraham and Samuel Horst, and base Samuel's right to the credit of \$1000 on his purchase, upon the actual legal right he might have to the fund held in trust by his father; whereas all the evidence shows that unless he had been allowed the \$1000, he would not have purchased the farm.

And besides, as to the fifth prayer, the evidence is sufficient to establish a trust of the \$2400, and this prayer is not law. *Smith & Barber, Ex'rs vs. Darby, Guard.*, 39 *Md.*, 269; *Wheatley vs. Purr*, 1 *Keen*, 551; *McFadden vs. Jenkins*, 1 *Hare*, 463; 1 *Phillips*, 153.

The defendant's prayers should be sustained, because they properly leave to the jury the finding of the contract between Abraham Horst and the defendant for the sale and purchase of the farm, and properly declare the law as to the trust established by Peter Eshleman, having respect to the relation of said trust to the said contract, upon which the plaintiffs have sued. *Smith & Barber, Ex'rs vs. Darby, Guard.*, 39 *Md.*, 269; *Dubost, Ex Parte*,



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Reiff, *et al.*, Trustees *vs.* Horst.

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18 *Vesey*, 145; *Gardner vs. Merritt*, 32 *Md.*, 78; *Cox vs. Sprigg*, 6 *Md.*, 274.

BOWIE, J., delivered the opinion of the Court.

The appellants, as trustees, for the creditors of Abraham Horst, sued the appellee in *assumpsit*, for money payable by the defendant to the plaintiffs.

The only item of the bill of particulars, in dispute, on this appeal, is the sum of one thousand dollars, claimed as balance due on farm sold by Abraham Horst, to the appellee.

No question arises on the pleadings.

At the trial, the appellant offered five prayers, three of which, the first, second and fifth, were rejected.

The appellee offered four, all of which were granted, to which action of the Court below, the plaintiffs excepted.

The appellee, the defendant below, was the son of Abraham Horst, who was the son-in-law of Peter Eshleman.

The appellants proved, that the appellee, in the year 1875, purchased of his father, A. Horst, a farm for \$8600, all of which was paid, except \$1000, "which was left standing in the farm." The appellants further proved, that afterwards, on the 10th of July, 1876, Abraham Horst conveyed to the appellants, for the benefit of his creditors, all of his property of every description, including bonds, notes, *choses in action*, and accounts of A. Horst, with power to sue for and recover the same. The appellee proved, by A. Horst, that he had offered to sell the farm to the defendant for \$8600, to which defendant at first objected; but afterwards said he would take the farm at that price, provided witness would let the \$1000 stand, which defendant said was *his portion* of the moneys his grandfather had placed in witness' hands; witness said he would do that, and the defendant agreed to buy the farm on those conditions; and a few days thereafter, the deed for the farm was executed by the witness to the defendant.

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Reiff, *et al.*, Trustees *vs.* Horst.

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It was further proved by the same witness, that the defendant paid the purchase money, by cancelling certain notes of the witness, and assuming debts, etc., which, together with the \$1000, which witness agreed to pay him from his grandfather's moneys, and which was considered as a part payment of the purchase money for the farm, amounted to the whole purchase money expressed in said deed.

The witness further said, that \$1000 of this purchase money, was not paid to him in money for the following reasons:

"That in 1845, the witness, being the son-in-law of Peter Eshleman, the said Eshleman gave him the sum of \$400; and afterwards in 1856, the said Eshleman gave him \$2000 more, and at the same time, he told Abraham (the witness) that he gave him this \$2000, on the following terms and conditions, viz., that he should hold the sum of \$2000, and also the sum of \$400 given eleven years before, *for the benefit of the grandchildren of the said Eshleman*, to be paid to them, with interest;" that on these terms and conditions, the witness took the money and used it in his business; that in 1858, his wife died; in March, 1875, being the owner of the farm mentioned in the deed, he sold it to his son for \$8600, and as a part payment thereon treated \$1000 of the purchase money, as due the defendant as his part of the two sums above mentioned, with interest, etc., that there were five children for whose benefit the money was held in trust; and witness and defendant concluded that \$1000 was about the fair share of the defendant, and therefore, that sum was allowed him.

Other testimony was offered, on cross-examination of Abraham Horst, and the defendant, tending to show the alleged trust as to the funds received by the father, had never been recognized or executed by him as to his other children, and that the objects and terms of the trust were variant from those stated by the witness A. Horst.

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Reiff, *et al.*, Trustees *vs.* Horst.

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The propositions contained in the appellants' prayers which were rejected, concisely stated, are

1st. That if the jury believe that Eshleman, the father-in-law of Abraham Horst, gave his son-in-law four hundred dollars in 1845, absolutely as a gift, and that eleven years afterwards, Horst received the sum of \$2000, not as a loan, but as a fund to be held in trust by him for his children; and then for the first time it was agreed and understood, that the \$400 previously given, should also be treated and held as in trust, the same as the \$2000, then the jury are instructed that these facts are sufficient to create a trust in the said \$400.

2nd. If the jury find that Abraham Horst received \$2000 as a fund to be held for the benefit of his wife during her life, and after her death to be divided among her children, and that after his wife died and not before, the fund was held in trust for her children; and the money was to be equally divided between them, they (the jury) will ascertain each child's share, with interest from their mother's death to the date of the deed; and if they find a sum greater than a child's share was left in the farm, bought by defendant of A. Horst, they will find for the plaintiffs for such difference.

3rd. That there was no evidence sufficient to establish a trust as to the sums of \$400 and \$2000 respectively between Abraham Horst and Samuel Horst, and A. Horst was not a trustee for those sums, and if they find the farm was sold by the former to the latter for \$8600, which was not paid in full, and that A. Horst afterwards made to the plaintiffs the deed of the 10th of July, 1876, the plaintiffs are entitled to recover whatever portion of the purchase money remains unpaid.

The first and third propositions, which are the substance of the appellants' first and fifth prayers, are founded upon the theory that the evidence is not sufficient to establish a trust in either of the sums, said to have been advanced by Eshleman.

The second proposition, which is the appellants' second prayer condensed, assumes that if a trust is proved, then in the event that more money remains unpaid on the farm, than the defendant's share of the trust money, the appellants are entitled to recover the difference. The trust is not assailed upon the ground that it was in fraud of creditors, but because the terms in which it was declared, are not certain and imperative.

The authorities fully sustain the appellants' position, that the trust must be declared in terms "clear and explicit, and point out with certainty both the subject-matter of the trust and the person who is to take the beneficial interest," *Perry on Trusts*, secs. 77, 86, but the appellants' first prayer does not present any such objection. It assumes that the trust, as to the sum of \$2000, was to be held by Abraham Horst, "in trust for his children," but declares that if the jury should find, "and then for the first time it was agreed and understood, that the \$400 previously given should also be treated and held as in trust, the same as the \$2000, then the jury are instructed that these facts are insufficient to create a trust in the said \$400."

The grounds of objection to the trust as to the item of \$400, indicated in this prayer, are 1st, it was an absolute gift, 2nd, eleven years elapsed, between the gift, and the agreement between the father-in-law and son-in-law to convert it into a fund for the benefit of the children.

"All persons, '*sui juris*' have the same power to create trusts that they have to make a disposition of their property." *Perry on Trusts*, p. 15, sec. 28.

It does not require a valuable consideration to make such trusts binding between the trustee and *cestui que trust*. Yet if such consideration was necessary, an agreement between two persons, in the relation of father-in-law and son-in-law, in behalf of their common descendants, to raise a fund for their benefit, would be both a good and

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Reiff, *et al.*, Trustees *vs.* Horst.

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valuable consideration, and if *bona fide*, binding on all the world. There is no doubt of the legal competency of a father to declare himself a trustee of a particular sum, in favor of his children.

As to declarations of trust of personal property, it is said in that standard work upon the *Equitable Jurisdiction of the Court of Chancery* by *Spence*, "It seems to be agreed, as a general rule, that if a person effectually declares himself, or his debtor, to be trustee for another of the money or property to be recovered, whether in writing or (as trusts of personal estate are capable of being created without writing,) by acts and declarations of a decisive and definite nature sufficiently proved, the transaction will be binding against him and his representatives, and this, whether the property be recoverable by the party himself, or by a trustee for him. The doctrine, said the Vice-Chancellor WIGRAM, is not confined to cases where the legal interest is conferred or acquired in pursuance and execution of an antecedent agreement or direction leading to the uses or trusts of that property, it extends to all cases where the transaction is complete; that is, where the declaration by the party entitled, whether legally or equitably, shows a definite intention by that act, at once to denude himself of all beneficial interest in the subject in favor of another." 2 *Vol.*, p. 897, *in mar.*; *Bayley vs. Boulcott*, 4 *Russ.*, 347; *Bell vs. Cureton*, 2 *My. & K.*, 503; *Jones vs. Croucher*, 1 *Sim. & S.*, 315, and 1 *Hare*, 461; note C., *Sp. Eq.*, 897.

The character of a trust was impressed upon a sum of \$400 by the agreement of Abraham Horst, to hold that amount, for the same purposes for which he received the \$2000 from his father-in-law, viz., "in trust for his children." It is not too much to say, that the one was the consideration for the other. There is no uncertainty in the subject-matter or the object of the trust, nothing optional or indecisive as set out in the prayer.

Reiff, *et al.*, Trustees *vs.* Horst.

In the testimony of A. Horst, there is some contrariety between his statements of the declaration of the trust in his examination-in-chief and in his cross-examination. These discrepancies were to be weighed by the jury. They are to determine how far his testimony was to be relied on.

There is no reference to the testimony in the appellants' first prayer, except so far as its substance is partially embodied therein, in relation to the first item of the alleged trust fund.

We think therefore, that the appellants' first prayer was properly refused.

If we are correct in this conclusion, it follows almost necessarily, that the appellants' second and fifth prayers, which constitute their second and third propositions should be refused.

Both of these virtually declare there was no sufficient evidence of a trust existing as to the funds in question, as to which the defendant was entitled to a share, and which as testified by his father, was to be deducted from the price of the land, or credited as part payment of the purchase money.

There was, in our opinion, competent testimony to establish the existence of a trust for the benefit of the grandchildren of Eshleman, in both items; and if the jury believed the evidence, the defendant was entitled to an allowance for his share of the fund, with such interest as the jury might allow.

The defendant's prayers being the reverse of the propositions above considered, it follows that they were, in our opinion, properly granted.

*Judgment affirmed, with  
costs to the appellee.*

(Decided 15th July, 1879.)

THE FRANKLIN BANK OF BALTIMORE *vs.* EDWARD  
LYNCH.

*Question whether an Authority to draw a Draft constituted an Acceptance, or merely a Promise to accept; and whether the Endorsee could recover against the Drawee upon the general Money counts—The form of the Declaration by the Endorsee of such Draft considered—Right of the Endorsee to sue upon the Promise to accept and pay the Draft—A bona fide holder not Affected by the state of Accounts between the Draicer and Drawee—Absence of Laches in presenting Draft for Acceptance.*

E. L. living in Westminster, Maryland, sent to B. & Co., of Baltimore, a telegram dated April 27th, 1878, in the following words: "you may draw on me for seven hundred dollars." The same was received about two o'clock p. m. the same day, being Saturday. On the Monday following, April 29th, B. & Co. drew their draft in favor of themselves on E. L. for \$700, payable at sight. On the day of its date, the draft endorsed by B. & Co. was received by the F. Bank of Baltimore, and the amount thereof placed to the credit of the drawers upon the faith of the telegram and the authority thereby given, the same being shown to said Bank. The draft was sent to a Bank in Westminster for collection, and on the 7th day of May, 1878, was presented to E. L., who refused to pay the same, and it was protested for non-payment. In an action by the F. Bank against E. L. upon said draft, it was HELD:

- 1st. That the telegram of April 27th, cannot be deemed and treated as an acceptance of the draft.
- 2nd. That the suit could not be maintained as an action upon an accepted draft, nor could the plaintiff recover upon the general money counts.

The declaration did not allege an acceptance by the defendant, actual or implied, but the ground of the action as there stated was that the defendant authorized B. & Co., to draw a draft on him for \$700, and promised that he would pay the said sum to the holder of the

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Franklin Bank of Baltimore *vs.* Lynch.

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draft on the presentation thereof to him the defendant. It then alleged that in pursuance of said authority, B. & Co. drew the draft payable at sight, that the same was endorsed by B. & Co., and passed to the plaintiff for value, and was received by the plaintiff upon the faith of the authority given to B. & Co., by the defendant. It further alleged the presentation of the draft to the defendant, and his refusal to pay the same. **HELD:**

- 1st. That this did not constitute a count upon an accepted draft, but for the breach by the defendant of his contract to accept and pay a draft drawn on him by his authority; and was sufficient, and substantially averred a breach by the defendant of his implied promise to accept and pay the draft according to its tenor and effect.
- 2nd. That the telegram must be construed as an authority to draw the draft payable at sight.
- 3rd. That such an authority implies a promise to accept the draft upon presentation, and to pay it at maturity, that is to say, at the expiration of the days of grace, viz., three days after sight.
- 4th. That such authority to draw, and promise to accept and pay inures to the benefit of any *bona fide* holder of the draft who takes it on the faith of the promise.
- 5th. That the plaintiff being the *bona fide* holder of the draft was not affected by the state of accounts between B. & Co., and the defendant.

The draft having been received by the plaintiff in Baltimore on the 29th of April, and presented to the defendant at Westminster for acceptance on the 7th of May, there was no ground for imputing laches to the plaintiff in presenting the draft for acceptance.

**APPEAL** from the Circuit Court for Carroll County.

The case is stated in the opinion of the Court.

*First Exception.*—At the trial the corporate existence of the plaintiff was admitted. The plaintiff then gave in evidence the following telegram:



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Franklin Bank of Baltimore vs. Lynch.

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Dated WESTMINSTER, MD., — 27th, 1878.

Received at S. W. cor. Calvert and Baltimore Sts.,

Baltimore, April 27.

To A. P. Baer & Co., 7 Cheapside, Baltimore:

You may draw on me for seven hundred dollars.

EDWARD LYNCH.

And it was admitted that the same had been sent by defendant as it purports, and received by Arthur P. Baer & Co., on Saturday, 27th April, 1878, at 1 o'clock, 58 minutes, p. m.; that on Monday, following, the 29th, said telegram was shown to the cashier of plaintiff, and at the same time the draft or bill of exchange was drawn and endorsed, as it purports, and plaintiff was requested by said Baer & Co., to accept said draft as cash, and to give said Arthur P. Baer & Co. credit on their cash account in or with plaintiff, for the said sum of \$700, on the faith thereof; that plaintiff did then and there, on the faith of the authority of defendant, contained in said telegram, take and accept said draft for so much cash as appears on the face thereof, to wit, \$700, and give said Arthur P. Baer & Co. credit for \$700, on their cash account with the plaintiff, and entered said credit of \$700, in the bank-book of said Arthur P. Baer & Co., so as to show that said Arthur P. Baer & Co. had a credit for \$700 cash in said bank; that the plaintiff sent said draft or bill of exchange to the Union National Bank of Westminster for collection; and then gave in evidence the protest. And it was admitted that said draft had been presented to defendant, as stated in said protest, and payment thereof was refused by defendant; that defendant resided in Westminster, and Arthur P. Baer & Co., in Baltimore; and that said Arthur P. Baer & Co. was a firm, composed of Arthur P. Baer and Charles E. Savage, who resided and carried on business as leather merchants, in Baltimore.

The defendant then offered to prove by defendant himself, that from 27th April to 7th May, 1878, he had in

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Franklin Bank of Baltimore *vs.* Lynch.

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hand no funds of Arthur P. Baer & Co.; to the admissibility of which proof the plaintiff objected, and the Court (MILLER, C. J., and HAMMOND and HAYDEN, J.) overruled the objection and allowed the proof to be given. The plaintiff excepted.

*Second Exception.*—After the case was closed the plaintiff offered the following prayer:

The plaintiff, by its counsel, prays the Court to instruct the jury on the pleadings and evidence, that if the jury shall believe from the evidence that on the 27th day of April, 1878, the defendant sent to Arthur P. Baer & Co., by the name of A. P. Baer & Co., the telegram given in evidence, and that the same was received at the telegraph office in the City of Baltimore, at the hour of one o'clock, fifty-eight minutes, or two minutes before two o'clock, p. m., and was, after that time, delivered to Arthur P. Baer & Co.; and shall find that said 27th April was Saturday; and shall further find, that on the 29th day of the same month, said Arthur P. Baer & Co., drew and endorsed the draft given in evidence, and offered the same to the plaintiff as and for the value of seven hundred dollars, and at the same time produced and delivered to the cashier of the plaintiff the said telegram, and that the plaintiff agreed to accept said draft as and for the value of seven hundred dollars, and as seven hundred dollars on the faith of the authority given by the defendant as expressed in said telegram, and shall find that said Arthur P. Baer & Co. delivered said draft to the plaintiff, and the plaintiff accepted the same, and gave a credit to said Arthur P. Baer & Co. for the sum of \$700, as and for the proceeds of said draft, on the cash account of said Arthur P. Baer & Co., in or with the plaintiff, and that said transaction was made and entered into by the plaintiff on the faith of the authority given by said telegram, and on the faith that said defendant would pay said draft according to the purport of said telegram; and if the jury shall

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Franklin Bank of Baltimore vs. Lynch.

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further find, that said draft was sent by the plaintiff to the Union National Bank of Westminster for collection, and that said draft was duly presented to the defendant, and payment was refused by him, and the same was protested, as purports by the protest given in evidence; and if the jury shall further find, that said Arthur P. Baer & Co. was a firm doing business in the City of Baltimore, and was composed of Arthur P. Baer and Charles E. Savage, partners, the verdict of the jury must be for the plaintiff for seven hundred dollars, and interest thereon from the 7th day of May, 1878.

And the defendant offered four prayers, which need not be set out.

The Court rejected the plaintiff's prayer, and gave the following instruction in lieu of the defendant's prayers:

If the jury find from the evidence, that the firm of Arthur P. Baer & Co., on the 29th of April, 1878, drew the draft offered in evidence, and that the same was never presented to the defendant for acceptance, and that there was no acceptance of the same by the defendant, otherwise than that to be inferred or implied from the telegram of the 27th of April, 1878; and that he refused to pay the same when presented to him for that purpose, on the 7th of May, 1878, then the plaintiff is not entitled to recover under the pleadings in this cause, even though the jury may find the sending of the said telegram by the defendant, and the receipt of the same by Baer & Co., as proved by the witnesses, and that the Bank, the plaintiff, knew of such telegram and received said draft, and credited the firm of Baer & Co., with the amount thereof, on the faith of the said telegram, and the authority thereby given by the defendant to said firm.

The plaintiff excepted, and the verdict and judgment being against him, appealed.

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Franklin Bank of Baltimore vs. Lynch.

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The cause was argued by agreement of counsel, before BARTOL, C. J., and BOWIE, J., and the decision was participated in by BRENT, GRASON, ALVEY and IRVING, J.

*Wm. P. Maulsby*, for the appellant.

The Court determined that the plaintiff below could not, under any state of facts, recover, on the ground that the telegram did not authorize the drawing of the draft at sight; and that the doctrine stated in *Coolidge vs. Payson*, 2 *Wheaton*, 75, does not apply to sight drafts, but only to drafts payable on demand, or at a fixed number of days after sight. This was the only question intended by the Court, as announced from the bench, to be embodied in the Court's instruction, given in lieu of the defendant's prayers; and the instruction, as contained in the record, correctly represents the intention of the distinguished Judge who prepared it.

This view of the Court was founded on a supposed report of the case in 1 *Story's C. C. R.*, 22, contained in a note to the *Amer. Ed. of Byles on Bills*, 252.

On an examination of that case, it will be found that no such question was decided. The report in the note to Byles gave only so much of the opinion of Judge STORY as was *obiter dictum*, and there ended. And the *dicta* of that Judge touched, not the question of a draft payable at sight, but that of drafts payable at a fixed number of days after sight. And all his reasonings applied only to the latter class of drafts.

The doctrine stated in 2 *Wheaton*, is, "that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." And the reason of the doctrine is, that such a letter "gives credit to the bill, and may induce a third person to take it."

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Franklin Bank of Baltimore *vs.* Lynch.

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The same doctrine is affirmed in *Townsend vs. Sumrall*, 2 *Peters*, 180, and again, by this Court in *Lewis vs. Kramer and Rahn*, 3 *Md.*, 265.

There is no difference in authority or principle, between a draft payable at sight, and on demand. Sight and demand are, in substance, identical.

If the first exception shall be necessary to be considered, the same case in 2 *Peters* is authority for the reversal of the ruling of the Court in that exception.

The question of presentment, notice, protest, &c., have nothing to do with the case.

The ground of the action is the appellant's promise to accept, and identical therewith to pay; the promise accrues to any person who shall take the draft to be drawn on the credit of the appellant's promise.

*Charles B. Roberts*, for the appellee.

The telegram contains no description of any draft that could, by possibility, have been drawn. It is so general in its terms that there is an entire absence of all reasonable certainty, and did not furnish to the appellant any justifiable excuse for its action in discounting said draft. *Ulster County Bank vs. McFarlin*, 3 *Denio*, 553; *Rees, et al. vs. Warwick*, 2 *Starkie*, 411; *Coolidge vs. Payson*, 2 *Wheaton*, 66.

The draft was not drawn until the 29th of April, 1878, (and must be presumed to have been issued when dated, *Roscoe's Nisi Prius*, 363,) and was not, therefore, in existence when the telegram was sent by appellee, on 27th of April, 1878, to A. P. B. & Co., and having been drawn payable "at sight," (and not "after date,") is not in law an acceptance, and created no such liability as is sought to be enforced in the cause. *Wildes vs. Savage*, 1 *Story*, 22; *Russell vs. Wiggin*, 2 *Story*, 213.

BARTOL, C. J., delivered the opinion of the Court.

This suit was brought by the appellant against the ap-

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Franklin Bank of Baltimore vs. Lynch.

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pellee. The facts of the case were admitted, and so far as material may be thus stated.

The appellee, living in Westminster, Maryland, sent to Baer & Co., of Baltimore, the following *telegram* :

WESTMINSTER, MD., April 27, 1878.

To A. P. Baer & Co.,

7 Cheapside, Baltimore :

"You may draw on me for seven hundred dollars."

"EDWARD LYNCH."

The same was received about 2 o'clock p. m. the same day, being Saturday. On the Monday following Baer & Co. drew their draft on the appellee as follows :

(\$700.)

BALTIMORE, April 29, 1878.

"At sight, pay to the order of ourselves, seven hundred dollars, value received, and charge the same to account of Arthur P. Baer & Co."

To Edward Lynch, Esq.,

Westminster, Md.

On the day of its date, the draft endorsed by Arthur P. Baer & Co., was received by the appellant, and the amount thereof placed to the credit of the drawers, upon the faith of the *telegram* and the authority thereby given, the same being shown to the appellant.

The draft was sent to a Bank in Westminster for collection, and on the 7th day of May, 1878, was presented to the appellee, who refused to pay the same, whereupon it was protested for non-payment.

Upon this state of facts, the Circuit Court instructed the jury "that if they find that the draft was never presented to the defendant for acceptance, and that there was no acceptance of the same by him otherwise than that to be inferred, or implied from the telegram; and that he refused to pay the same when presented to him for that

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Franklin Bank of Baltimore vs. Lynch.

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purpose, on the 7th of May, 1878, then the plaintiff is not entitled to recover under the pleadings in this cause, even though the jury may find the telegram was sent by the defendant and received by Baer & Co., and that the plaintiff knew of the telegram and received the draft and credited the firm of Baer & Co., with the amount thereof, on the faith of the telegram, and of the authority thereby given by the defendant to said firm."

To the granting of this instruction, and also to the refusal of the prayer offered by the plaintiff, the latter excepted.

The plaintiff's prayer need not now be particularly noticed, as the questions for our consideration arise upon the Court's instruction.

And, *first*. Was the telegram equivalent to an acceptance of the draft, entitling the plaintiff to maintain a suit thereon, as on an accepted bill?

It was decided by the Supreme Court in *Coolidge vs. Payson*, 2 *Wheaton*, 66, (affirming *S. C.*, 2 *Gallison*, 233,) "that a letter written within a reasonable time before or after a bill of exchange is drawn, describing it in terms not to be mistaken, and promising to accept, is if shown to one who takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise." That decision was based upon the cases of *Pilans & Rose vs. Von Mierop & Hopkins*, 3 *Burr.*, 1663; *Pierson vs. Dunlop, Cowper*, 571, and *Mason vs. Hunt*, 1 *Doug.*, 296, decided by Lord MANSFIELD.

It would seem that this is not the law in England at this time, as appears from the opinions of the eminent counsel, *Sir Wm. Follett*, *Sir John Bayley*, *Sir Frederick Pollock* and *Mr. M. D. Hill*, in 2 *Story, C. C. R.*, 219, 220, and from the case of *Bank of Ireland vs. Archer*, 11 *Mees. & Welsby*, 384 m.

But the rule laid down in *Coolidge vs. Payson* was afterwards re-asserted in *Shimmelpenick, et al. vs. Bayard, et al.*,

## Franklin Bank of Baltimore vs. Lynch.

1 *Peters*, 264, 283, and in *Boyce & Henry vs. Edwards*, 4 *Peters*, 111, 121. It was recognized and approved by this Court in *Lewis vs. Kramer & Rahn*, 3 *Md.*, 289, and seems to be well established in this country, by the general current of judicial decisions, many of which are cited in *Hare & Wallis'* note to the case of *Bank of Ireland vs. Archer*, 11 *Mees. & Welsby*, 390, (*Am. Ed.*)

The rule was laid down in *Coolidge vs. Payson* with great strictness and precision. To construe a promise to accept as equivalent to an actual acceptance, it must be one "describing the bill in terms not to be mistaken."

In *Boyce & Henry vs. Edwards*, *supra*, it was said that "Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill," and in the same case it was said that "the rule laid down in *Coolidge vs. Payson* requires the authority to draw, to point to the specific bill or bills to which it is intended to be applied, in order that the party who takes the bill may not be mistaken in its application;" or in the words of Chief Justice SHAW, the authority to draw, or the promise to accept, ought "specifically to describe or designate the bill, so as to identify it, and distinguish it from all others," in order to bring it within the American cases. *Carnegie, &c., vs. Morrison, &c.*, 2 *Metcalf*, 406.

We refer also to *Wildes vs. Savage*, 1 *Story*, 22.

Upon the authorities we think it very clear that the telegram of April 27th cannot be deemed and treated as an acceptance of the draft.

The telegram does not point to or designate the draft; only the amount for which Baer & Co. were authorized to draw is mentioned, but in all other respects the telegram is silent, not specifying on what time the draft is to be drawn.

In *Wildes vs. Savage*, 1 *Story*, 22, the learned Judge said that the rule laid down in *Coolidge vs. Payson* has



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Franklin Bank of Baltimore *vs.* Lynch.

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never been held to apply to a bill drawn *at sight*, or *after sight*; and assigns very satisfactory reasons why a promise to accept a draft of that kind cannot be deemed or treated as an actual acceptance.

We hold, therefore, that this suit cannot be maintained as an action upon an accepted draft, and for the same reason the appellant is not entitled to recover upon the general money counts.

The instruction of the Circuit Court refers to the pleadings, this requires us to examine them and to determine the nature and ground of the present suit. This depends upon the construction to be put upon the first count in the *narr.* If it is to be understood as declaring upon an acceptance of the draft by the appellee, it is clear from what has been said, that the plaintiff cannot recover upon it. But is that the true intent and meaning of the count?

It does not allege an acceptance by the defendant actual or implied, but the ground of the action, as there stated, is that the defendant authorized Baer & Co. to draw a draft on him for \$700, and promised that he would pay the said sum to the holder of the draft on the presentation thereof to him, the defendant. It then alleges that in pursuance of said authority, Baer & Co. drew the draft payable at sight; that the same was endorsed by Baer & Co., and passed to the plaintiff for value, and was received by the plaintiff upon the faith of the authority given to Baer & Co. by the defendant. It further alleges the presentation of the draft to the defendant and his refusal to pay the same.

This is not a count upon an accepted draft, but for the breach by the defendant of his contract to accept and pay a draft, drawn on him by his authority.

The declaration would be more technically accurate, if it had averred in terms, the refusal of the appellee to accept the draft when it was presented, and his failure to pay the same at maturity; but we think it is sufficient

Franklin Bank of Baltimore vs. Lynch.

and substantially avers a breach by the appellee of his implied promise to accept and pay the draft according to its tenor and effect.

The telegram authorized Baer & Co. to draw on the defendant for \$700. The authority did not specify or limit the terms of the draft, or the time upon which it was to be drawn. It is an authority without condition or qualification. There is no evidence of any commercial usage, or other testimony showing that such an authority imports that the draft shall be drawn payable at or after any particular time; nor is there any reason for saying that it did not authorize a draft payable at sight, this is left to the discretion or convenience of Baer & Co., and as the defendant did not impose any limitation or restriction in this respect, we think it must be construed as an authority to draw the draft in question.

Such an authority implies a promise to accept the draft upon presentation, and to pay it at maturity, that is to say, at the expiration of the days of grace, viz., three days after sight.

Now the question arises, has the plaintiff a right of action for the breach of that promise? The only objection that could be urged to the plaintiff's right to sue, would arise from the supposed want of privity between it and the defendant. The promise was made to Baer & Co., not to the plaintiff. But this objection cannot be supported. It has often been decided that such an authority to draw and promise to accept and pay, inures to the benefit of any *bona fide* holder of the bill who takes it on the faith of the promise.

In such case the import and meaning of the promise is that it is not made exclusively to the drawer of the bill, but is a promise made to any person into whose hands the bill may come *bona fide* for value; that the same shall be accepted and paid according to its tenor and effect; and such person may maintain an action for the breach of the promise.

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Franklin Bank of Baltimore vs. Lynch.

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This question was ably considered and decided by Judge STORY in *Russell, &c. vs. Wiggin*, 2 Story, 213, and by the Supreme Court of Massachusetts in *Carnegie vs. Morrison*, 2 Metcalf, 381, where the subject is treated with great ability in the opinion of Ch. J. SHAW.

The doctrine of the liability of a party, giving authority to draw, to any *bona fide* holder of the bill drawn pursuant to such authority, lies at the foundation of the law governing "letters of credit" in the commercial world, and is well considered in the two cases last cited.

In this case the plaintiff was a holder of the draft for value; *Swift vs. Tyson*, 16 Pet., 1; *Maitland vs. the Citizens' National Bank*, 40 Md., 540, and is not affected by the state of accounts between Baer & Co. and the defendant; the evidence mentioned in the *first bill of exceptions* was therefore immaterial, and ought to have been rejected.

There is no evidence of fraud, collusion or bad faith on the part of Baer & Co. and the plaintiff, in respect to the endorsement and delivery of the draft; nor is there any ground for imputing laches to the plaintiff in presenting the draft for acceptance.

For the reasons stated, we think the Circuit Court erred in giving its instruction to the jury, and that the plaintiff's prayer ought to have been granted.

*Judgment reversed, and  
new trial ordered.*

(Decided 15th July, 1879.)

## BERNARD MAURICE vs. JOHN L. WORDEN.

*Act of 1847, ch. 158—Question whether the ground ceded to the United States for a Naval Academy, can be considered "out of the State" within the meaning of the Act of Limitations—Validity of a reservation by the State of the right to execute Process within the ceded territory—Construction of the Act of Limitations, with reference to a Defendant's absence from the State during a part of the period within which Action must be brought—Art. 57, sec. 4, of the Code.*

In an action of assumpsit in which the Statute of Limitations was pleaded, the plaintiff replied: 1st. That at the time of the cause of action aforesaid accruing to him against said defendant, the said defendant was absent out of the State, to wit: within the territory ceded to the United States of America by the State of Maryland, under and by virtue of the Act of Assembly of said State, of the year 1847, ch. 158; and that this action was commenced within three years after the presence of said defendant within this State, and out of the aforementioned ceded territory. 2nd. That after the contracting of the said debt on the part of the said defendant, whereby the said cause of action accrued to said plaintiff, and within *three years* after, the said defendant absented himself from the State, whereby the said plaintiff was at an uncertainty of finding out said defendant or his effects; nor did the said defendant at the time of so leaving the State, leave effects sufficient and known for the payment of his just debts in the hands of any person who assumed the payment thereof to his creditors, and this action was brought within three years after defendant's return to this State; nor had the defendant been in this State for three years in all after the aforesaid cause of action accrued to the said plaintiff, at the time this suit was commenced. On demurrer, it was HELD:

- 1st. That the power reserved to the State by the Act of 1847, ch. 158, to have its process served in the territory by that Act ceded to the United States for the Naval Academy, is valid and operative.
- 2nd. That as process from the Circuit Court for Anne Arundel County could reach the defendant while residing there, he could

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Maurice vs. Worden.

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not *pro tanto* be considered "out of the State" within the meaning of the Act of Limitations.

3rd. That the allegation in the second replication, that the defendant within three years from the accrual of the cause of action left the State, whereby the plaintiff "was at an uncertainty of finding the said defendant or his effects," was not a sufficient answer to the plea.

4th. That sec. 4, of Art. 57, of the Code, on which said replication was based, must be construed with reference to the time and circumstances under which the Act of 1715, ch. 23, from which it was codified, was passed, as set forth in the recital by way of preamble to the 4th sec. of that Act; and in subordination to well established rules in reference to Limitations.

5th. That the plaintiff could not, as attempted by the last part of the second replication, avoid the Act of Limitations by going into a calculation of time, showing that the defendant had not been within the State *precisely three years in all*, from the time the cause of action arose, to the time of suit brought.

APPEAL from the Circuit Court for Anne Arundel County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, BRENT and ALVEY, J.

*Charles J. Bonaparte* and *John Thomson Mason*, for the appellant.

The plaintiff's first replication is sufficient to remove the bar of the statute, under sec. 5, of Art. 57, of the Code, unless the averment "that at the time of the cause of action aforesaid accruing against said defendant, the said defendant was absent out of the State," is vitiated by the further averment, "to wit: within the territory ceded to the United States of America by the State of Maryland, under and by virtue of the Act of Assembly of the said State, of the year 1847, chap. 158." In other words, the question before the Court is, whether the United States

reservation at Annapolis is "out of the State," in the contemplation of Art. 57, of the Code?

"Out of the State," or equivalent words in the Statute of Limitations, mean "beyond the limits of the State's political sovereignty." *Smith's Adm'rs vs. Heirs of Bond*, 8 Ala., 386, 388, 390; *Sleight vs. Kane*, 1 Johns. Cas., (N. Y.,) 76, 81; *Bank of Alexandria vs. Dyer*, 14 Pet., 141.

Territory acquired by the United States under the provisions of Art. 1, sec. 8, of the Constitution, is beyond the limits of the State's political sovereignty. *Story on the Constitution*, sec. 1227; *Sinks vs. Reese*, 19 Ohio St. Rep., 306; *Chauvenet vs. Comm'rs of A. A. Co.*, 3 Md., 259; *Commonwealth vs. Clary*, 8 Mass., 72, 77; *Mitchell vs. Tibbetts*, 17 Pick., 298; 1 Metc., (Mass.,) 580.

Consequently such territory is "out of the State."

The proviso in the above-mentioned act of cession, "that all civil \* \* \* \* \* process may be executed therein in the same way and manner as though this cession and consent had never been made and granted," was relied on in argument before the Circuit Court as avoiding this conclusion. But the service of process, although a *negative*, is not an *affirmative* test of sovereignty; i. e. the State is not sovereign where its writ does not run. *Smith's Adm'rs vs. Heirs of Bond*, 8 Ala., 386, 388, 390; *Sleight vs. Kane*, 1 Johns. Cases, (N. Y.,) 76, 81, but its writ may, by agreement or sufferance, run into territory over which it is not sovereign. Such process is *quoad hoc* that of the true sovereign. *Story on the Constitution*, sec. 1225; *Rawle on the Constitution*, 238; 1 *Kent's Comm.*, (12th Ed.,) 429, 430; 3 Md., 263, (argument of Mr. Donaldson;) *United States vs. Cornell*, 2 Mason, 60, 65, 66; and no more affects the territorial sovereignty than do the privileges accorded to foreign Courts by Art. 37, sec. 33, of our Code, and sec. 871, of the U. S. Rev. Statutes. The question whether the Statute of Limitations *ought not* to enure in favor of residents upon territory open to the civil process of the State, is, of course, one for the Legislature alone to pass upon.

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Maurice vs. Worden.

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The plaintiff's second replication requires that this Court should construe (for the first time, so far as his counsel are aware,) sec. 4, of Art. 57, of the Code. The section does not specify *any time* after the contracting of a debt within which the defendant's absence will call it into effect, so that a literal construction might make such an absence revive a claim already barred. This question is, however, avoided in this case by the express averment in the replications—and within three years thereafter. The qualifying proviso in the section as to the protection gained by "leaving effects sufficient and known for the payment of the debtor's just debts in the hands of some person who will assume the payment thereof to his creditors," having been carefully negatived in the replication, it would seem to be too clear for argument that, upon the admission of the demurrer, the appellee is not to "have any benefit of any limitation \* \* \* \* \* contained" in Art. 57 of the Code. The exact meaning of this clause may possibly admit of some doubt; but only three constructions can possibly be put upon it.

1. It may mean that such an absence as it mentions shall *forever* debar the debtor from relying on limitations. *Nelson vs. Beveridge*, 21 Mo., 22, 23, 24. In this view the plaintiff's suit would be in time whenever brought.

2. Or it may mean that the creditor shall have until *three years after* the debtor's return to this State to bring his suit. *Cook's Ex'r vs. Holmes*, 29 Mo., 61, 63, 64; *Armaby vs. Letcher*, 3 Bibb, (Ky.), 269, 270, 271; *Prather vs. Ross*, 10 B. Mon., (Ky.), 15, 16.

This construction is fully met by the averment in the replication—"and this action was brought within three years after the defendant's return to this State," which is, of course, admitted by the demurrers to be true.

3. Or this section may be construed as equivalent to the provision contained in the statutes of limitations of nearly

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Maurice vs. Worden.

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every other State in the Union, (although *not* in the English statute,) that the time a debtor is absent from the State shall not be computed in his favor. *Fisher vs. Phelps*, *Dodge & Co.*, 21 *Tex.*, 551; *Berrien vs. Wright*, 26 *Barb.*, 215; *Pope's Ex'r vs. Ashley's Ex'r*, 13 *Ark.*, 262; *Gilman vs. Cutts*, 3 *Foster*, (*N. H.*) 376; *Chenot vs. Lefevre*, 3 *Gilm.*, (*Ill.*) 637; *Brigham vs. Bigelow*, 12 *Metc.*, 268; *Mudville vs. Huston*, 15 *La. Ann.*, 281; *Wells & Sappington vs. Shreve's Adm'rs*, 2 *Houst.*, (*Del.*) 329; *Johnson vs. White*, *T. U. P. Charlton*, (*Ga.*) 140; *Sullenberger vs. Guest & Mills*, 14 *Ohio*, 204.

To cover this point, the plaintiff has appended to his replication the statement—"Nor had the defendant been in this State for three years *in all* after the said debt had been so contracted, as aforesaid, at the time this suit was commenced."

A statutory right or exemption is properly pleaded in the words of the statute—*Ford vs. Babcock*, 2 *Sandf. S. C. R.*, (*N. Y.*) 518, 523; 10 *B. Monroe*, 16—even if it should be conceded that sec. 4 contemplates a *fraudulent* absence. But this is a pure assumption, unsupported by either the language of the section, the preamble which originally preceded it, 1 *Dorsey's Laws of Md.*, 10 and 109; or the analogy of similar statutes in other States, 10 *B. Mon.*, 16.

So soon as a debt has been contracted, limitations, under Article 57, begin to run, provided the debtor is not "absent out of the State," under section 5; and unless the debtor is then *in* the State, he cannot possibly afterwards "absent himself from" it. The entire provision becomes, therefore, nugatory, if it is to be construed with respect to the rule, that when Limitations have commenced to run, a subsequently accruing disability will not arrest them, or, at best, is merely the equivalent of section 5—a construction not only irreconcilable with its tenor, but directly contradicted by the history of the two Acts thus



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Maurice vs. Worden.

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codified. 1 *Dorsey's Laws of Md.*, 10 and 109; *Hysinger vs. Baltzell*, 3 *G. & J.*, 159.

The rule in question, however, is merely a rule of statutory construction applied to section VII of the Statute of James I, *Alexander's Br. Stat.*, 449, and which cannot defeat the expressed or clearly implied intention of the Legislature. 21 *Texas*, 556; 29 *Missouri*, 63, 64; *Bennett vs. Devlin*, 17 *B. Mon.*, 359, 362; 3 *Foster*, (23 *N. H.*), 376, 382, 384; *Coventry vs. Atherton*, 9 *Ohio*, 34, 35, 36.

That the Legislature which enacted this section did not intend it to be thus construed is as certain, upon the face of the statute, as any proposition can be, not expressed in *totidem verbis*; and when we consider the avowed purpose of the original Act, its evident equity, and the motives of public policy which have induced a large majority of our sister States to adopt provisions more distinctly repudiating the rule in question in similar cases,—See *Statute Law of Alabama, Arkansas, Kentucky, Texas, Massachusetts, New Hampshire, Louisiana, Delaware, Florida, Illinois, Ohio, Missouri, New York, Georgia, Virginia*,—it seems little less than monstrous that the Courts should be asked to repeal, by judicial legislation, a clearly expressed and carefully guarded exemption from the bar of a statute always *strictissimi juris*, and never favored by the law.

*J. Wirt Randall* and *John H. Thomas*, for the appellee.

The appellee's demurrer to the first replication to these pleas was properly sustained, because the State of Maryland, by the Act of Assembly which ceded to the United States the territory referred to in said replication, expressly reserved over it jurisdiction concurrent with that of the United States. It was, therefore, part of the State of Maryland for jurisdictional purposes. The defendant, while there, was liable to the civil process of its Courts, and limitations ran in his favor, as if he had been elsewhere in the State. *Act of 1847, ch. 158; Act of 1858,*

## Maurice vs. Worden.

ch. 185, sec. 1; *Act of 1866*, ch. 68; *Act of 1867*, ch. 294, sec. 3; *Act of 1867*, ch. 387; 1 *Kent's Com.*, 429; 2 *Story on Constitution*, secs. 1225, 1227; *Bank of Alexandria vs. Dyer*, 14 *Peters*, 141; *Rhodes vs. Bell*, 2 *Howard*, 405; 2 *Greenleaf on Evidence*, sec. 437; *Mitchell vs. Tibbetts*, 17 *Pick.*, 298, 301; 1 *Metc.*, 580, 582, 583; *Hysinger vs. Baltzell*, 3 *G. & J.*, 159.

The plaintiff's second replication to the third and fourth pleas of the defendant and the demurrer thereto, involves the construction of sec. 4, Art. 57, of the Code. This section embodies secs. 4 and 5, of the Acts of 1715, ch. 23, and 1765, ch. 12. *Mayer's Digest*, 549; 1 *Dorsey's Laws of Md.*, 9, 10 and 109.

The language of sec. 4, of the original Act, shows that it was intended to apply "to persons absenting the province, or wandering from county to county, *until the time* by the late Act, for the reasons and purposes aforesaid limited and allowed, *were expired*;" and the *absence* or *leaving*, according to the express words of sec. 5, of the original Act, must be an absence or "leaving this province *for the time and term in this Act limited*;" or as it is codified in sec. 4, Art. 57, of the Code, "*leaving this State for the time herein limited.*"

The undoubted rule of law is, that when the Statute is once set in motion, no subsequent disability can arrest it, and only a plain statutory exception, presumptions being in favor of the bar. Neither the death of the defendant, *Stewart vs. Spedden*, 5 *Md.*, 448. Nor any subsequent disability of the plaintiff. *Hertle vs. McDonald*, 2 *Md. Ch. Dec.*, 128; 3 *Md.*, 366; *Dugan vs. Gittings*, 3 *Gill*, 139; *Young vs. Mackall*, 4 *Md.*, 362; *Hogan vs. Kurtz*, 4 *Otto*, 773. Particularly no recurring disability of plaintiff. And so of a recurring absence of defendant, the *term* or *time* of absence is but *one* term or time, a continuous absence so long as it lasts, and the Statute set in motion by the

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Maurice vs. Worden.

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return of defendant, is not stopped even by another absence. *Angell on Lim.*, (6th Ed.), secs. 206, 207, 209, and notes; *Faw vs. Roberdean*, 3 Cranch, (S. C.) 174; *Hysinger vs. Baltzell*, 3 G. & J., 158; *Clark's Ex'rs vs. Trail's Adm'r*, 1 Met., (Ky.), 40; *Mitchell vs. Berry*, *Ibid.*, 610; *Ingraham & Read vs. Bowie*, 33 Miss., 17; *Cole vs. Jessup*, 2 Barbour, 313; *Drew vs. Drew*, 37 Me., 392; *Langdon vs. Doud*, 6 Allen, (Mass.) 423; *Sage vs. Hawley*, 16 Conn., 112.

The language of the Statute in some States has carried their Courts to a different conclusion; but in no case has ever such general language as our Statute contains, been so construed, and the particular phrases above quoted are peculiar to our law and clearly show that the general rule and the doctrine laid down in the above cases, peculiarly apply to our Statute.

A contrary view would torture words which speak of an *absence from* the State of three years, or *until* three years have *expired*, into meaning a *presence within* the State of three years.

BRENT, J., delivered the opinion of the Court.

The questions presented upon this record are raised by a demurrer to the replications filed by the appellant, who was plaintiff below, in answer to a plea of the Statute of Limitations.

The declaration is in *assumpsit*. The defendant pleaded not indebted, *non assumpsit* and Limitations. Issue was taken to the first and second pleas, and to the plea of Limitations the plaintiff rejoined,

First, that at the time of the cause of action aforesaid, accruing to him against said defendant, the said defendant was absent out of the State, to wit, within the territory ceded to the United States of America by the State of Maryland, under and by virtue of the Act of Assembly of the said State of the year 1847, ch. 158; and that this

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Maurice vs. Worden.

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action was commenced within three years after the presence of said defendant within this State, and out of the aforementioned ceded territory.

Second, that after the contracting of the said debt on the part of the said defendant, whereby the said cause of action accrued to said plaintiff, and within *three years* after, the said defendant absented himself from the State, whereby the said plaintiff was at an uncertainty of finding out said defendant or his effects; nor did the said defendant, at the time of so leaving the State, leave effects sufficient and known for the payment of his just debts, in the hands of any person who assumed the payment thereof to his creditors, and this action was brought within three years after defendant's return to this State; nor had the defendant been in this State for three years in all after the aforesaid cause of action accrued to the said plaintiff at the time this suit was commenced.

The demurrer was sustained by the Circuit Court for Anne Arundel County, and the plaintiff appealed.

The 5th section of Article 57, of the Code, provides, that if any person liable to any action shall be absent out of the State at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation contained herein, if the person who has the cause of action shall commence the same after the presence in this State of the person liable thereto within the terms herein limited.

And the question arises, what is the meaning of the terms, there used, "out of the State," as applicable to this case?

It would be a useless task to review the several cases which have been cited, in which the words "beyond the seas" and "out of the State," have been construed. There is in reality no conflict among them, and they all tend to ascertain whether or not in the particular case the party could be reached by the process of the Court. We have

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Maurice vs. Worden.

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found nowhere the law in this respect more correctly or succinctly stated than it is by Mr. Greenleaf in his work on Evidence. In the 2nd volume, section 437, it is said, "The disability arising from absence out of the country, is usually expressed by being *beyond sea*; but the principle, on which this exception is founded, is, that no presumption can arise against a party for not suing in a foreign country, nor until there is somebody within the jurisdiction whom he can sue; and therefore, the words 'beyond sea,' in the statute of any State are expounded as equivalent to being 'out of the State,' and receive the same construction. And the latter form of words is held equivalent to being 'out of the actual jurisdiction;' that is, *beyond the reach of process*; so that where a part of the territory of a State, in time of war is actually and exclusively occupied by the enemy, a person within the enemy's lines is out of the State, within the meaning of the Statute of Limitations." The case of *Sleight vs. Kane*, 1 Johns. Cases, 76, is cited as a leading case upon this doctrine. There a part of the territory of the State of New York was occupied and held by British troops. The maker of the note sued upon was within their lines, at the time when it was claimed limitations commenced to run in his behalf. It was held, notwithstanding the terms of the Statute were "out of the State," that he could not avail himself of its provisions, for although within the territorial limits of the State he was beyond the process of its Courts.

Does the replication in this case allege any fact, which shows that the appellee was beyond the reach of process from the Courts of this State, at the time the cause of action accrued against him?

The Act of 1847, ch. 158, specially referred to in the replication as the Act by which the State of Maryland ceded to the United States the ground upon which the Naval Academy at Annapolis is established, by express

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Maurice vs. Worden.

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terms, reserves to the State the right to serve civil process within its limits. This reservation is plainly set out, in a proviso to the first section, as follows: "*provided always, and the cession and jurisdiction aforesaid are granted upon the express condition, that this Commonwealth shall retain a concurrent jurisdiction with the United States in and over the said lands and ceded territory, so far, as that all civil, and such criminal process as may issue under the authority of this State, against any person or persons charged with crimes committed without said lands and ceded territory, may be executed therein in the same way and manner as though this cession and consent had never been made and granted, except so far as such process may affect the real and personal property of the United States within the said ceded territory.*"

A similar provision is found in the Acts of other States ceding a portion of their territory to the United States for forts, hospitals, navy yards and so on, and no case seems to have arisen in which the reservation has been declared invalid. On the contrary the right, reserved to the State to serve its process in the cases enumerated, has been regarded as a wise precaution, that the territory thus ceded may not be made a refuge and sanctuary for debtors and criminals. The cases, relied upon by the counsel for the appellant, of *Mitchell vs. Tibbetts*, 17 *Pick.*, 298, 1 *Met.*, (*Supplement*) 580, and *Sinks vs. Reese*, 19 *Ohio*, 306, are not in opposition to the power of the State to reserve the right of process in ceded territory, but the inference to be drawn from them is strongly in support of it. The rights claimed in each of them were denied, and referred to as not being within the power reserved by the State in the Act ceding the land in question to the United States. In the case in 17 *Pickering*, the question was the power of the State of Massachusetts to enforce a penalty against a vessel for bringing stone from the State of Maine to the Navy Yard at Charlestown, without having

complied with the requirements of a statute of the State. The case in *1st Metcalf*, involved the right of a party, living within the ceded territory, to the use of the public schools of the State for the education of his children, and the case in *19th Ohio*, the right of the inmates of the United States Asylum in that State to be considered as residents of the State, and as such to exercise the right of voting.

We are satisfied that the power, reserved by the State to have its process served in the territory ceded to the United States for the Naval Academy, is valid and operative. And as the process from the Circuit Court for Anne Arundel County could reach the appellee while residing there, he cannot *pro tanto* be considered "out of the State" within the meaning of the Act of Limitations. The demurrer to this branch of the appellant's replication will therefore be sustained.

The other replication of the appellant rests upon the 4th sec. of Art. 57 of the Code. The provisions of this section, codified from the old Act of 1715, ch. 23, secs. 4 and 5, are peculiar to this State. We know of no case in practice where its provisions have been relied upon to avoid the running of the Statute. The profession does not seem to have relied upon its rather ambiguous terms, and it is now for the first time brought before the consideration of this Court.

This section must be construed with reference to the time and circumstances under which the law from which it is codified was passed, and in subordination to well established rules in reference to Limitations.

The recital by way of preamble to the section in the original law shows, that it was passed to reach the cases of persons who absented themselves from the province, or wandered from county to county for the reason of availing themselves of the time limited in the law. After the debt was contracted or the cause of action

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Maurice vs. Worden.

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arose, they so moved from place to place or left the province as to conceal from the creditor their place of abode; and no reasonable time was allowed him in which to bring his action. It was to remedy this evil that secs. 4 and 5 of the Act of 1715, were adopted as a part of the Law of Limitations in the province, and in that sense they must now be understood, as they are codified in the 4th sec. of Art. 57 of the Code.

The replication of the appellant alleges that *within three years* from the accrual of the cause of action, the appellee left the State, whereby the appellant "was at an uncertainty of finding out the said defendant or his effects." This allegation, if issue had been joined by the appellee instead of his demurring, would have been supported by proof, that the appellee after being in the State subject to process for two years and eleven months, or even a day short of three years, had then left the State, and the creditor was thereby put to an uncertainty of finding him or his effects. This interpretation cannot be given to the section in question. *Hysinger vs. Baltzell*, 3 G & J, 158.

When the Statute has once commenced to run, by the liability of the debtor to the service of process, no subsequent disability will arrest it, unless otherwise provided by a plain and unambiguous statutory exception. *Dugan vs. Gittings*, 3 Gill, 139; *Stewart vs. Spedden*, 5 Md., 448; *Hogan vs. Kurtz*, 4 Otto., 773; *Angell on Lim.*, secs. 196 and 197, and authors there cited.

By the interpretation sought to be given to the section in question, any absence of a debtor from the State in a place unknown to the creditor would arrest the Statute, although such absence was but of short duration, and had occurred but just previous to the expiration of the time limited. This construction cannot be adopted. But the section must be understood as applicable to the cases only, which it was manifestly intended to reach, when



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Maurice vs. Worden.

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the original law, from which it is codified, was enacted.

Another objection to this replication is also fatal upon demurrer. It is charged that the appellee had not, after the accrual of the cause of action and before suit brought, been in this State *for three years in all*. That every absence from the State is to be counted against a defendant creditor, has not been received as accepted law. On the contrary, as before seen, when the Statute has once applied, its running is not arrested unless by some plain statutory exception. We do not think that under any fair construction of any part of the Act of Limitations in this State a plaintiff can avoid the Act, by going into a calculation of time and showing that the defendant had not been within the State *precisely three years in all* from the time the cause of action arose to the time of suit brought. This the replication in the present case is intended to effect, and in this respect must be considered as fatally defective.

We do not think the Circuit Court committed any error in its rulings, and we shall affirm its judgment.

*Judgment affirmed.*

(Decided 15th July, 1879.)

MARY G. WORTHINGTON vs. ARIETTA COOKE and  
ISRAEL COOKE, her husband.

*Covenant running with the Land—Liability of a Fême Covert to be sued at Law upon her separate Covenant in a Lease—Uniting her Husband as Co-defendant a misjoinder—Construction of sec. 2, of the Act of 1867, ch. 223.*

The second sec. of the Act of 1867, ch. 223, provides that "In all deeds hereafter made to married women of real estate or chattels real, it shall be competent for the grantee or lessee to *bind herself* and *her assigns* by any covenant running with or relating to said real estate or chattels real, the same as if she was a *fême sole*." A deed of lease to a married woman made subsequent to this statute contained her separate covenant to pay a certain annual rent for the demised premises, and all taxes thereon. In an action against her and her husband for the breach of her covenant, it was upon demurrer  
HELD:

- 1st. That the covenant to pay rent and taxes was one that runs with the land, and is embraced by the terms of the statute.
- 2nd. That the remedy upon such covenant is by action at law.
- 3rd. That the husband should not be joined as co-defendant.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

The appellees were the defendants below and demurred to the plaintiff's declaration. The Court below, (GAREY, J.,) sustained the demurrer, and the plaintiff appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and ROBINSON, J.

*L. L. Conrad*, for the appellant.

The Act of 1867, ch. 223, sec. 2, empowers a married woman as lessee or grantee, not only to bind *herself* but

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Worthington vs. Cooke.

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her *assigns*; and the extent of that power is defined to be "the same as if she was a *fême sole*." A man would have no greater power. It endows a married woman, therefore, with the very fullest capacity to covenant within the limits prescribed by the Act. It is obvious, too, that such covenant was intended to be her *personal* obligation, for she is authorized to "bind *herself*." The capacity to contract given her by this statute was designed to be a new capacity—one not possessed by her before, namely, to bind herself personally. The statute was unnecessary, if its object was to enable her to bind her separate estate; that she was competent to do without this statute. Besides, the language of the Act is free from ambiguity, and invests her unmistakably with power to "bind herself and her assigns." This language is in the usual form in which *personal* covenants are made.

Covenants to pay rent and taxes are covenants "running with the land," by which is meant that they follow the land into the hands of the assignees, and bind them during their holding through privity of estate. That is all. A covenant running with the land is no less a *personal* covenant than one not running with the land. Its effect is not to subject the land to any lien or charge, or create any other liability than a personal obligation to fulfil the covenant, or to answer for its breach. *Lester vs. Hardesty*, 29 Md., 50; *Mayhew vs. Hardesty*, 8 Md., 479.

Such being the case, the inquiry recurs, ought the covenantor to be sued for a violation of her covenant, at law or in equity?

It is clear that under the decisions of this Court there was no remedy in equity.

Courts of equity undoubtedly exercise peculiar jurisdiction in regard to the persons and property of married women; and principally in regard to their property. 2 *Story's Equity Juris*, sec. 1366.

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Worthington *vs.* Cooke.

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It is also true that such Courts concern themselves, not with the general property of married women, but with their separate property.

In equity, however, a married woman possesses power to dispose of her separate estate; and such estate is liable for all debts, charges, encumbrances and other engagements which expressly or by implication she charges thereon. Her agreement, however, creating the charges is declared to be not a contract, but an exercise of her power of disposition—an appointment *pro tanto* out of the separate estate; for as a *fême covert*, even in equity she is held incapable of contracting. 2 *Story's Equity Juris.*, sec. 1399.

In *Francis vs. Wigzell*, (1 *Mad.*, 258,) Sir THOMAS PLUMMER said: "There is no case in which this Court has made a personal decree against a *fême covert*. She may pledge her separate property and make it answerable for her engagements, but where no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained." *Aylett vs. Ashton*, 1 *Mylne & Craig*, 105-111; *Francis vs. Wigzell*, 1 *Mad.*, 258; 2 *Story's Equity Juris.*, sec. 1397, and especially note 1.

In Maryland it is settled law that a married woman cannot bind or affect her separate estate, unless the obligation sought to be enforced presents upon its face some evidence of the intent to charge the estate, or there be some evidence *aliunde* tending to prove such intent. *Koontz vs. Knabb*, 16 *Md.*, 549; *Jackson vs. West*, 22 *Md.*, 84; *Wilson & Hunting vs. Jones*, 46 *Md.*, 349.

It is perfectly clear that the covenants under consideration in the case at bar, being simply covenants to pay ground-rent, taxes, &c., in the usual form, neither expressed nor implied an intent, nor were designed, to bind the separate estate of the covenantor.

This being established, and it being true as matter of law, as heretofore shown, that equity has no power against

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Worthington vs. Cooke.

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a married woman *in personam*, it appears perfectly plain that the appellant had no remedy in equity against the appellant, Arietta Cooke.

The next question is, was she also without remedy at law?

The affirmative of this question involves the assertion that she had no remedy at all. There is no escape from this consequence. The appellees gravely ask this Court to decide that in Maryland there may exist a perfect obligation—a contract legal in form and made between persons legally competent to make it, without any remedy to enforce it.

By the common law a married woman could be grantee in a deed, without the consent of her husband. He might, it is true, divest the estate by dissent. But if he neither agreed nor disagreed, the purchase was good. *Baxter vs. Smith*, 6 Binn., 427; 4 *Cruise Dig.*, 25.

She might even be grantee upon condition, and would be bound to perform the condition. 1 *Roll. Abr.*, 421; 2 *Cruise Dig.*, 35; *Patterson vs. Robinson*, 25 Penn., 82.

The Code having endowed her with legal independence, so to speak, doubts might well exist, as recited in the preamble of the Act we are considering, whether a power to covenant did not arise in her as a proper and legal consequence of her legal independence, and as incident to her legal ownership of property.

It was, in order to set such doubts at rest, and to make her responsibilities commensurate with her rights, that the Act of 1867 was passed.

It was contended below, that, inasmuch as sec. 2 contained no provision of special remedy for breach of the covenants therein authorized to be made, therefore, whatever its purpose, the section must be held to be ineffectual.

We are not able to see the force of this conclusion. No need existed that any special remedy should be provided. Remedy for breach of covenant already existed,

and had existed and been pursued from times of immemorial antiquity. If legal capacity to make a covenant existed, the remedy was ready at hand. The authority to "*bind* herself" carried with it legal responsibility as a necessary consequence. Can it be said that any one can "*bind*" himself, if the obligation may not be enforced. There is no such thing as a "binding" obligation that cannot be enforced. The enforceability alone makes it *binding*. That is what is meant by being *bound*, namely, that the obligation *is* enforceable. If it is not enforceable, then you are not bound. To hold otherwise would be to say that a "binding" obligation may be one that is *not* binding.

This Court has never decided, nor do we believe it possible for any Court to decide, that there exists any contract authorized by law, made by a person legally competent to make it, for breach of which there is absolutely no remedy. Such a decision would be an anomaly in judicial history, and involve a feebleness of judicial power, and a failure of justice, without precedent or analogy.

This Court has declared explicitly that in Maryland, at least, there is no right without a remedy. In "*Wright vs. Freeman*" it said, "Now the proposition is most true, that wherever the law gives a right it also gives a remedy for the violation of such right. *Wright vs. Freeman*, 5 H. & J., 475; *County Comm'rs of Anne Arundel Co. vs. Duckett*, 20 Md., 478.

The remaining question arising out of the record in this case is: was the husband properly joined as co-defendant?

In *Bridges & Woods vs. McKenna*, 14 Md., 266-267, this Court held, that where the property of a married woman, doing business as sole trader under the 8th sec. of the Act of 1842, ch. 293, (incorporated into the Code as sec. 7 of Art. 45,) was attached for her debts, her hus-

## Worthington vs. Cooke.

band must be sued as co-defendant. The Court says: "The statute enables her to acquire and dispose of certain property as a *fême sole*, but does not entirely remove her disability. Being *covert*, she cannot sue or be sued in a Court of law as a *fême sole*; that is to say, without the joinder of her husband. *Bridges, &c. vs. McKenna*, 14 Md., 266-267; *Hubbard vs. Barcus*, 38 Md., 174.

To the same effect is the decision in *Hancocks & Co. vs. Madame Demeric—Lablache*, 3 Common Pleas Div., (*Law Reports*,) 147, &c.

That case arose under sec. 1 of the Statute, 33 and 34 Victoria, ch. 93, (the married woman's property Act, 1870,) which declared that any earnings, wages and property acquired by a married woman in any employment carried on separately from her husband, should be deemed property settled to her separate use, independent of her husband.

In a suit brought by creditors to subject property acquired under this section, to the payment of the married woman's debts incurred in the course of her employment, it was held, that the husband must be joined as co-defendant.

The reasoning supporting this decision is analogous to that in *Bridges, &c. vs. McKenna*, above cited.

In "*Anonymous*, 6 Mod., 239, (case 349,)" it was held, that covenant will lie against husband and wife upon a deed of demise to the wife, *dum sola*, whereby she covenanted that she would every year, during the term, plant so many oak plants on the premises.

It will be observed that the Act of 1867, sec. 2, authorizes a married woman "to *bind* herself as a *fême sole*;" but it would seem from principle and analogy that, being married, she should be sued as a *fême sole* would be sued after marriage, upon her contract made *dum sola*; namely, jointly with her husband.

In *Brown vs. Kemper*, 27 Md., 666, this Court held, that in an action of tort against husband and wife jointly

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Worthington vs. Cooke.

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for the tort of the wife, where judgment was recovered against them both, a *feri facias* might properly issue and be levied on the separate property of the wife.

Here the husband was made responsible for the wife's tort, as a consequence of marriage, and the separate property of the wife was held seizable at law under the judgment. What reason or principle forbids a similar judgment in the case at bar, qualifiable in the discretion of the Court, by controlling its form, so as to make execution issuable only against the wife's property?

*Wm. A. Hammond*, for the appellees.

It will not be denied that at common law a married woman could in no case be sued upon a mere personal contract, made during coverture. *Mayer vs. Soyster*, 30 Md., 402.

Even a judgment by default, regularly entered against her, will be treated as a nullity, and will be enjoined in equity. *Griffith vs. Clark*, 18 Md., 457.

If the Act of 1867, chapter 223, alters this law, it should do so in clear and explicit terms. Being in derogation of such firmly established common law principles, it will be construed strictly, and if effect can be given to its provisions by any other reasonable construction, this Court will be slow to hold that it allows a married woman to be sued at law upon a contract into which she may enter, without the concurrence of her husband.

The first section gives the right of distraint, and in case of no sufficient distress being found, it authorizes re-entry for non-payment of rent, but for no other reason.

It frequently happens, however, that it is important to introduce other covenants and conditions into the lease besides those in reference to the payment of rent, distress and re-entry. The land may be required to be improved in a particular manner, or its use may be restricted to a particular purpose, and a violation of the covenants in



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Worthington vs. Cooke.

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these and a variety of other respects may work a forfeiture of the lease. It is submitted that the second section of the Act was intended to cover covenants or conditions introduced for the purpose above named; and the Legislature wisely refrained for attempting to enumerate all such cases, and contented itself with authorizing the lessee or grantee to bind herself and her assigns by any covenant running with or relating to the demised premises, the same as if she were a *fême sole*. For what purpose? Not with a view of allowing her to be held personally responsible at law; else why restrict it to covenants running with or relating to the demised premises? But clearly for the purpose of giving the landlord all the rights and remedies against the property itself which he would have in case the lessee were a *fême sole*.

Such a construction is reasonable, fair and consistent with the object of the Act as recited in the preamble. It gives full effect to every part of the law, and is not obnoxious to the grave objections and inconveniences which necessarily follow the construction contended for by the appellant.

According to her construction, the Act not only authorized a married woman to lease property without the consent or concurrence of her husband—certainly a very long stride in the direction of the entire separation of the interest of husband and wife—not only made her personally liable upon her covenants contained in such lease, and bound all her other separate estate for the performance thereof, thus virtually destroying the husband's marital rights therein, but it actually made him liable upon a covenant into which he never entered; of which he may have been entirely ignorant; to which he may have objected, and against which he may have protested and fought to the last extremity. The letter of the statute requires no such construction, and even if it did, that which is not within the spirit of an enactment is not

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Worthington *vs.* Cooke.

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within its letter. *Mayor and City Council of Baltimore vs. Root*, 8 *Md.*, 95.

If such had been the intention of the Legislature, it would scarcely have been less careful and explicit in its expression in this Act than in the Act of 1872, chapter 270, which, for the first time, authorized an action at law against a married woman upon a contract executed during coverture. Nor would it have failed to guard the rights of the husband by requiring him to join in the execution of the contract sought to be enforced, as was done by the latter Act.

But let us suppose, for the sake of the argument, that the Act was intended to enable a married woman to be held liable personally upon her covenant.

In what form is that liability to be enforced?

Is the ordinary jurisdiction of Courts of equity over the affairs of married women to be ousted, and is a new and unheard of jurisdiction to be given to Courts of law by mere implication? The statute makes no provision on the subject; no machinery is provided by which this extraordinary covenant is to be enforced; no common law jurisdiction in such a case—none given by statute. What Court will assume to take cognizance of such an action, until the authority is expressly given by the Legislature? *Groome vs. Gwinn*, 43 *Md.*, 572.

But again, supposing the action to be properly maintainable against the wife, upon what theory can the husband be held liable on a covenant into which he never entered?

In all actions *ex contractu* against several, it must appear upon the face of the pleading that the contract was joint. 1 *Chitty on Pleading*, 44; *Walcott vs. Canfield*, 3 *Conn.*, 198.

And the fact that the defendants are husband and wife does not alter the law upon this point. 1 *Chitty on Pleading*, (mar.) 59.

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Worthington *vs.* Cooke.

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By the Act she is a *feme sole* for the purpose of executing the covenant; why not also for the purpose of its enforcement? In equity the husband is always a proper party for conformity, and to enable him to protect his interests and those of his wife, while the decree may be so framed as not to prejudice or bind him individually.

But at law, if he is a proper party at all, the judgment will bind him as well as the wife, and his property may be taken for the debt of another.

The practice in such a case should be similar to that in attachments against married women as *feme sole* traders, in which the husband is never joined. *Brent, Trustee vs. Taylor*, 6 Md., 58; *Crane vs. Seymour*, 3 Md. Ch. Dec., 483; *Bridges & Wood vs. McKenna*, 14 Md., 258.

ALVEY, J., delivered the opinion of the Court.

This is an action brought on a separate covenant of a married woman, contained in a lease, against the lessee and her husband jointly. The covenant is to pay a certain annual rent for the premises, and all taxes thereon; and the breach alleged is the non-payment of rent accrued due, and certain taxes that have been assessed.

The defendants demurred to the declaration; and the grounds of the demurrer are, according to the contention of the defendants, 1st, that a married woman is not suable at law upon breach of a covenant made during coverture; and, 2nd, that if the action be maintainable against the wife, it was error to join the husband.

Whether these positions or either of them be well taken, depends upon the proper construction of the second section of the Act of 1867, ch. 223. That Act adds two sections to Art. 45, of the Code; and by the first of these additional sections, it is provided that, in all cases of leases for definite terms to married women, if the rent reserved remain in arrear for ninety days, the landlord shall have the right to levy distress for such rent, "in the same

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Worthington vs. Cooke.

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manner as if the lessee was a *fême sole*;" and if there be no sufficient distress found upon the premises, he shall then have the power to make re-entry, or bring such action for the recovery of the demised premises, as he might do if the lessee were a *fême sole*, and had covenanted for the payment of the rent, and to suffer such re-entry to be made. The second section of the Act, the construction of which is particularly involved in this case, reads thus: "In all deeds hereafter made to married women of real estate or chattels real, it shall be competent for the grantee or lessee to *bind herself* and *her assigns*, by any covenant running with or relating to said real estate or chattels real, *the same as if she was a fême sole*."

As a general principle it is incontrovertibly true, that, at common law, a married woman cannot contract so as to make herself liable; though upon the principles of a Court of equity she may contract so as to bind her separate estate; and it is equally true, as a general proposition, that a *fême covert* cannot be sued alone at law. But to both these general propositions there have been, from an early period in the history of the common law, certain exceptions allowed, not only for the benefit of the wife, but for the benefit and protection of those with whom she might contract. As, for instance, if the husband was banished or had abjured the realm, (*Co. Litt.*, 133 a;) or if the husband be an alien residing abroad; in such cases, the wife would not only have the capacity to contract, but she would be capable of suing and of being sued alone, as a *fême sole*. *Deerly vs. Duchess of Mazarine*, 1 *Ld. Raym.*, 147; *Walford vs. The Duchess of Piennes*, 2 *Esp. N. P. Rep.*, 554; *De Gaillon vs. L'Aigle*, 1 *Bos. & Pull.*, 357; 2 *Kent Com.*, 155. There is nothing, therefore, very anomalous, even at the common law, in a married woman being allowed the capacity of and treated as a *fême sole*, under special circumstances.

In the cases just mentioned the power to contract, and the incidental right to sue and liability to be sued alone,

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Worthington vs. Cooke.

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were allowed from the force of circumstances and the necessity of the case ; but the right of a *fême covert* to contract in reference to her estate, and the consequent right to sue and her liability to be sued, have been greatly extended in recent times by statute ; and the statute under consideration is only an instance of the amplification of that power. But, while the statute before us is explicit in conferring the power to contract, and in declaring that the covenants authorized to be made shall be binding on the *fême covert* as if she was in fact a *fême sole*, it is insisted that, as the statute is silent as to the remedy for the enforcement of the covenants, the common law principle applies, that a *fême covert* is not suable at law on a contract made during coverture, and that the only remedy is by bill in equity. Whether this be so or not depends upon the intention of the Legislature, as we may gather that intention from the terms and provisions of the statute.

Why should the remedy be by bill in equity rather than by action at law on the covenant? The construction of the covenant and extent of liability thereby incurred are purely legal questions, and a Court of law is the proper *forum* in which to ascertain and award the *quantum* of damage sustained by reason of the breach of the covenant. As will be observed, the statute creates no specific lien or charge upon the property of the party making the covenant, to be enforced in a Court of equity. The covenant creates a personal obligation, and the party making it is bound not as a *fême covert*, but as if she were a *fême sole*. Any property that she may hold under the provisions of the Code as her separate estate may be made liable for the satisfaction of any recovery that may be had on the covenant. A Court of equity, in affording relief against the separate estate of a married woman, does not proceed against her *in personam*, but against the property only. No mere personal decree can pass against her, unless ex-

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Worthington vs. Cooke.

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pressly authorized by statute. *Francis vs. Wigzell*, 1 *Madd.*, 258; *Aylett vs. Ashton*, 1 *M. & Cr.*, 105; 2 *Sto. Eq.*, sec. 1397. Here, by the terms of the statute, she has bound herself and her assigns, and the remedy fit and appropriate for the enforcement of such an obligation is an action at law. The remedies given by the first section of the statute are purely of a legal character, and the party is to be proceeded against as if she were a *fême sole*, and we can perceive no possible reason for supposing that the Legislature intended a different character of remedy for the enforcement of the covenants authorized to be made by the second section of the statute. The covenant here being for the payment of rent and taxes, it is a covenant that runs with the land, and is, therefore, embraced by the terms of the statute, (*Mayhew vs. Hardesty*, 8 *Md.*, 479; and *Lester vs. Hardesty*, 29 *Md.*, 50;) and we think the remedy upon it is by action at law.

Then, the next question is, whether it was error to join the husband as co-defendant with the wife. Upon this question, we are clearly of opinion he should not have been so joined. The wife was authorized to enter into the covenant as if she had been a *fême sole*. She is therefore, in respect to the covenant and the remedies thereon, put upon the footing of a *fême sole*. She was authorized to make the covenant without the joinder of her husband, and without any reference whatever to his approval or disapproval; and that covenant is alone binding upon her and her assigns. If the husband was required to be joined as a defendant he would not only be subject to costs, but, according to the principles of the common law, the judgment would be joint, and he would be made liable for the breaches of a covenant to which he was not a party, nor bound by any privity whatever. This would be manifest injustice, and a result that the statute never was intended to produce. Not being himself a party to the contract, if, by being made a co-defendant in an action

Lange and Appel *vs.* Wagner.

for the breach, he could be made liable for the damages recovered, he would be entirely at the mercy of his wife and those with whom she might contract; and notwithstanding the wife be given the power to contract as if she were a *fême sole*, he would, in effect, be made to stand surety for the performance of the covenant, even though it be entered into against his positive remonstrance. The wife being authorized to contract as if she were a *fême sole*, the action must be maintained against her as if she in fact possessed the capacity of that *status*, and without reference to her coverture.

Concurring with the Court below in sustaining the demurrer to the declaration, we shall affirm the judgment; but we shall remand the cause under sec. 16 of Art. 5 of the Code, as modified by the 8th rule respecting appeals to the end that, by proper amendment, the cause may be tried upon its merits.

*Judgment affirmed, and  
cause remanded.*

(Decided 15th July, 1879.)

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GEORGE LANGE and ADAM APPEL *vs.* FRANTZ WAGNER.

*Action on an Injunction Bond—Items and Measure of Damages in such Action—A Survey and Measurement of land excluded as evidence in such Action, on the ground that the question of Title could not be tried in that collateral way and that the Survey was made ex parte—Effect of the Injunction Case upon the question of Title in an action upon the Injunction Bond.*

In an action on an injunction bond, proof was offered that the plaintiff was engaged in supplying his customers with milk, and kept a

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Lange and Appel *vs.* Wagner.

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number of milch cows. His frame stable having become somewhat out of repair, was partially torn down in the summer of 1877, and he began to erect a brick stable in its place. In August of that year, he was stopped by the injunction, which continued till the 6th day of December following. After it was dissolved he went on to complete the building, and had it finished about the 25th of the same month. While the injunction was in force the plaintiff's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather. The following question was then propounded to the witness: "what was the effect upon the cows if any, in consequence of being exposed to the wet and cold weather, because you could not finish the brick stable while the injunction suit was pending?" On objection by the defendants it was HELD:

That the question was pertinent and legal.

One of the grounds of special damage stated in the plaintiff's *narr.* was "the injury done to his cattle by exposure to the weather, requiring extra care and food, and causing their flow of milk to greatly decrease." HELD:

That such damage was one of the direct consequences of the injunction, for which the plaintiff was entitled to recover.

The defendants offered evidence for the purpose of proving that the stable was built in part upon land belonging to the defendant L., on objection it was HELD:

1st. That it was not competent for the defendant to prove title to the property in this collateral way.

2nd. That he was concluded on that question by the decision in the injunction case.

3rd. That the evidence by which it was offered to prove title was *ex parte* and inadmissible, being a survey and measurement of the ground made by a surveyor, not in the presence or by the authority of the plaintiff, or by any authority of law.

By the prayers which were granted the jury were instructed that they might find for the plaintiff "in such damages, if any, as shall appear from the evidence that he has actually and necessarily or directly sustained by reason of the granting and serving of the writ of injunction," and "that actual, natural and proximate damages are such as are the direct necessary and natural result and effect of the act complained of, and from which injury is alleged to have been sustained." And a prayer of the defendants,



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Lange and Appel vs. Wagner.

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which was granted, excluded from the computation of damages, all evidence of the rental value of the brick stable if it had been completed. **HELD:**

That these instructions left to the jury the question of the items and measure of damages in a way of which the defendants had no cause to complain.

APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

*First and Second Exceptions* sufficiently stated in the opinion of the Court.

*Third Exception.*—The plaintiff offered the following prayer:

If the jury find from the evidence that the complainant, mentioned in the bond offered in evidence, did not prosecute his writ of injunction therein mentioned to a successful termination, then they may find for the plaintiff in such damages, if any, as shall appear from the evidence that he has actually and necessarily or directly sustained by reason of the granting and serving the said writ of injunction.

And the defendants offered the nine following prayers:

1. That the Court instruct the jury separately, as to the following items of damage claimed by the plaintiff; that the plaintiff can only recover in this case such damages, in case they allow any, as was the actual, natural and proximate result and effect of his being stopped in the erection of his brick stable, by reason of the injunction mentioned in this case, and that the evidence offered by the plaintiff, and admitted subject to exception, and tending to prove damage and injury to the plaintiff's cows; the decrease in their yield of milk alleged to have been caused by their exposure to the weather, the loss to the plaintiff by reason of his being obliged to buy feed for his

cows by the small quantity at the time plaintiff was stopped as aforesaid, the difference of completing said stable at the time when the building of said stable was stopped as aforesaid, and the cost at the time when the said injunction was dissolved and said stable was completed, is not proper evidence, and therefore not admissible in this cause, and the evidence upon said several items is not to be considered by them in estimating or assessing damages, if any, to the plaintiff.

2. That the only injury for which they can allow damages to the plaintiff, in case they allow any, is such as would arise by reason of the cost and expense in money and labor expended by him in order to prevent loss or injury to his property and business by reason of his being stopped in the building of the brick stable referred to in this case, by the injunction issued as mentioned in this case, provided they shall believe from the evidence that all or any other loss or injury to the plaintiff, or his property, could have been avoided by the expenditure of a reasonable amount of money and labor.

3. That after the erection and building of the plaintiff's stable, mentioned in this case, had been stopped by reason of the injunction mentioned and referred to in this case, it was the duty of the plaintiff to avoid the consequences of the erection of said building being so stopped as far as reasonably could, and if by labor or by a reasonable outlay of money he could have stayed or avoided the consequences resulting from being stopped as aforesaid, he should have done so, and all consequences resulting from his own wilful failure or gross neglect to use timely and reasonable precaution, or means to prevent an extension or increase of the injury, should fall upon himself.

4. That actual, natural and proximate damages are such as are the direct, necessary and natural result and effect of the act complained of, and from which injury is alleged to have been sustained.

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Lange and Appel vs. Wagner.

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5. That the plaintiff has offered no evidence in this cause to prove that he expended any money or labor to prevent loss or injury to him from his being stopped in the erection of the brick stable mentioned in this cause.

6. That the answer of the plaintiff filed in the injunction case referred to, and the opinion of the Court filed in said case, which were offered in evidence in this case subject to exception, are not evidence, nor is either of them evidence, and that the same cannot be used in evidence before the jury in this case.

7. That in estimating damages for plaintiff, if any, the jury cannot make any estimate of the rental value of the brick stable mentioned in this case, because said stable does not appear to have been in the course of erection for the purpose of rental, and because there is no proof in this cause that the plaintiff ever offered the same for rent, or ever was offered rent for the same.

8. That if from the evidence the jury believe that the plaintiff, by the exercise of a reasonable expenditure of labor and money, could have prevented the injuries complained of, and failed so to do, the jury in estimating damages, if any, cannot estimate any damages for any injuries which the plaintiff, by the expenditure of a reasonable amount of money or of labor, could have prevented, provided they find from the evidence that said injuries complained of could have been prevented by the plaintiff by the expenditure of a reasonable amount of money or labor on his part.

9. That the papers in the injunction suit referred to in this case, and which papers were offered in evidence in this case by the plaintiff, are only evidence, if at all, for the purpose of proving that the injunction was issued at the instance of the complainant, and that the said injunction was subsequently dissolved, and said papers are evidence for no other purpose whatever.

Lange and Appel vs. Wagner.

The Court (YELLOTT, J.,) granted the plaintiff's prayer, and the defendants' fourth, seventh and ninth prayers (the said fourth prayer being conceded) and rejected the defendants' first, second, third, fifth, sixth and eighth prayers. The defendants excepted, and the verdict and judgment being against them, appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER, and ALVEY, J.

*Wm. E. Hoffman*, for the appellants.

The question and answer excepted to by the appellants, which forms the subject of the first bill of exceptions was clearly inadmissible. The injunction was for the purpose of stopping the erection of a brick stable, and *the effect of the weather upon appellee's cows*, because he could not finish the brick stable was not the *natural, proximate and necessary* result of the injunction, but was too remote to form an element of damage in this suit. The injunction did not turn the appellee's cows out of the stable, *nor expose them to the weather*, even if the effect of the weather upon them could be unmistakably shown. *Sedgwick on Damages*, (6th Ed.,) 92, and notes; *High on Injunctions*, sec. 964; *Brown vs. Jones*, 5 Nevada, 374; *Ubrig vs. City of St. Louis*, 47 Mo., 528; *Collins vs. Sinclair*, 51 Ill., 328; *Fort vs. Orndorff*, 7 Heisk., (Tenn.,) 173; *Haysler vs. Owen*, 61 Mo., 273; *Middlekauf vs. Smith*, 1 Md., 342-343; *Stewart vs. State, &c.*, 20 Md., 97.

The appellants were entitled to offer the proof as stated in their second bill of exceptions—at least in mitigation, if not entirely in bar, of appellee's claim for damages. If they could have shown by the witness Martinet *that a part of the brick stable in question was erected upon appellant Lange's ground*, other than the alleyway—this not having been a question in the injunction suit—then clearly there had been no damage to the appellee,

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Lange and Appel *vs.* Wagner.

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in his having beens topped in an improper and unlawful act.

Where no damage has been actually suffered, none should be allowed, is the rule in actions of this nature. If the appellee was in the commission of an unlawful act, he cannot claim damage resulting from his being so stopped. *High on Injunctions*, sec. 964; *Sedgwick on Damages*, (6th Ed.), marg., p. 47; *Jenkins vs. Parkhill*, 25 *Indiana*, 478.

The rejection of appellants' first prayer was error, for the reason that the appellee was not entitled to recover for any such remote damages as claimed by him, (the evidence having been admitted subject to exception.) These matters were not in any manner the direct and necessary result of the injunction, and to permit the appellee to make claim for them, would be to invite speculation in law suits, and offer a premium therefor. *Field on Damages*, sec. 558, p. 444; *Sedgwick on Damages*, (6th Ed.), 92 and notes; *Morgan vs. Negley*, 53 *Penn. St. Rep.*, 153; *Calloway Mining Co. vs. Clark*, 32 *Mo.*, 305; *Muller vs. Fern*, 35 *Iowa*, 420; *Academy of Music vs. Price*, 2 *Hilton*, (N. Y.) 217; *Brown vs. Jones*, 5 *Nevada*, 374.

The appellants' second, third and eighth prayers should have been granted, because the principle of law firmly established was therein correctly stated.

The evidence of appellee's witness Loeber, that the old stable from which the boards had been taken off, could have been fixed up for from \$5 to \$30, and the evidence of appellee's witness, Sheffer, all showing that the old stable could have been repaired by a small expenditure of time and money, limits the extent of the appellee's recovery. *He was only entitled to recover for such damage as he could not prevent or avoid.* This is in accordance with the law as laid down in this State. *Field on Damages*, sec. 21; *Sedgwick on Damages*, (6th Ed.), 94 and 95, (marg.), and

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Lange and Appel vs. Wagner.

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notes; *Greenleaf's Evidence*, sec. 256-261; *Lawson vs. Price*, 45 Md., 123-136.

If the appellee could have avoided the consequences of the alleged wrong, and was bound to do so and did not, then the appellants' fifth prayer should have been granted.

The granting of the appellee's prayer was erroneous, if the appellants' theory as laid down in the second, third and eighth prayers was correct, because it should have been qualified by the appellee's duty to protect himself as far as in his power, by reasonable effort and expense.

*H. P. Jordan*, for the appellee.

The appellee is clearly entitled to all the damages that he sustained by reason of the injunction suit, including *injury* to his cattle and loss of *profits* in his business. *Shafer vs. Wilson*, 44 Md., 269; *Brown and Otto vs. Werner*, 40 Md., 15; *Hamilton vs. The State*, use of *Hardesty*, 32 Md., 348 and 353; *Lawson vs. Price*, 45 Md., 138 and 139; *White vs. Mosely*, 8 Pick., 356; *B. & O. R. R. Co. vs. Thompson*, 10 Md., 88.

The Court properly rejected the evidence of Simon J. Martinet. It was immaterial and irrelevant—the only issue being the damages sustained by the appellee by the injunction suit. The question of title to the land could not be inquired into in this collateral way. The appellee had no notice whatever of any survey of the premises, and therefore could not be bound by it if the evidence had been admissible otherwise.

The question of ownership of the ground upon which the appellee was building his brick stable, (and which the appellant stopped by his injunction,) has been adjudicated and decided in the injunction suit, from which the appellants have taken no appeal. It is the law of the case until reversed by this Court.

The appellee can recover under his declaration for all losses and injuries coming within the terms and condi-

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Lange and Appel *vs.* Wagner.

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tions of the bond, which he can show has resulted to him by reason of the injunction. *Jenkins & Hewes vs. Hay*, 28 Md., 560. The injunction bond is liable for all damages even during the pendency of an appeal to the Court of Appeals. *Hamilton vs. State, use of Hardesty*, 32 Md., 348.

The appellants' first prayer was designed to restrict the power of the jury in deducing conclusions from certain facts before them, and was clearly wrong. *Lawson vs. Price*, 45 Md., 137. This prayer must have been rejected if the rulings of the Court in the first exception is correct. See authorities above cited, and *Jenkins & Hewes vs. Hay*, 28 Md., 560.

The appellants' second, third and eighth prayers all proceed on the same principle, and may all be included in one reply.—There is no evidence of “*wilful*” or “*gross neglect*.” These prayers were properly rejected because they exclude in toto the appellee's right to recover damages for any injury to which his want of diligence might have contributed, when at most it could only have reduced the damages, if negligence on his part had been proven, which was not done, but to the contrary, Their own witness, Lange, proved “we nailed the boards again on the old stable,” and Mrs. Wagner and Frantz Wagner, testify to have purchased more food and used more care to save the cows from greater injury. We were expecting the injunction case to be disposed of every week, and therefore avoided unnecessary expense. *Sedg. on Dam.*, (6th Ed.,) 107; *Mayne on Dam.*, 16; *Lawson vs. Price*, 45 Md., 136.

The appellants' fifth prayer was properly rejected. There was evidence of extra labor and money expended to prevent injury to the cows.

The sixth prayer was also properly rejected. If the record in the injunction suit was admissible for any purpose, it would have been error in the Court to exclude it;

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Lange and Appel vs. Wagner.

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and the *onus* is the objector to point out the inadmissible portion. *Pegg vs. Warford*, 7 Md., 604; *Levy, et al. vs. Taylor*, 24 Md., 282; *Budd vs. Brooke*, 3 Gill, 220; *Carroll's Lessee vs. The Granite Manufacturing Co.*, 11 Md., 408.

The appellants got all they were entitled to in their ninth prayer.

BARTOL, C. J., delivered the opinion of the Court.

At the instance of Lange, the appellant, a writ of injunction was issued by the Circuit Court for Baltimore County, prohibiting the appellee from completing the erection of a brick stable upon an alley-way, which Lange averred the appellee had no right to close, without his consent. The injunction was afterwards dissolved, and this suit was brought on the injunction bond of the appellants, to recover damages sustained by the appellee, by reason of the injunction.

The right of action is not disputed, the only questions raised by the bills of exception relate to the subject of damages and are presented in the form of exceptions to testimony, and to the rulings by the Court below upon the prayers.

These exceptions will be disposed of in the order in which they appear in the record.

*First Exception.*—Proof was offered that the appellee was engaged in supplying his customers with milk, and kept a number of milch-cows. His frame stable having become somewhat out of repair, was partially torn down in the summer of 1877 and he began to erect a brick stable in its place.

In August of that year he was stopped by the injunction, which continued till the 6th day of December following; after it was dissolved, the appellee went on to complete the building and had it finished about the 25th of the same month. While the injunction was in force, the



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Lange and Appel *vs.* Wagner.

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appellee's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather.

The question propounded to the witness, and objected to by the appellants, was "what was the effect upon the cows, if any, in consequence of being exposed to the wet and cold weather, because you could not finish the brick stable while the injunction suit was pending?" It seems to us the question was pertinent and legal.

One of the grounds of special damage stated in the *narr.* was "the injury done to his cattle by exposure to the weather, requiring extra care and food and causing their flow of milk to greatly decrease." Such damage was one of the direct consequences of the injunction, for which the plaintiff was entitled to recover. *Hamilton vs. The State*, 32 Md., 348; *Lawson vs. Price*, 45 Md., 124; *B. & O. R. Co. vs. Thompson*, 10 Md., 76, 88.

*Second Exception.*—The evidence offered by the defendants, set out in this bill of exceptions, was clearly inadmissible, and there was no error in excluding it. It was offered for the purpose of proving that the brick stable was built in part upon land belonging to the defendant Lange. It was not competent for the defendant to prove title to the property in this collateral way. He was concluded on that question by the decision in the injunction case. Moreover, the evidence by which it was attempted to prove title, was in itself inadmissible, the survey and measurement of the ground by Mr. Martinet, was not made in the presence, or by the authority of the plaintiff, or by any authority of law. It was made *ex parte*, and could not bind the plaintiff or affect his rights in any way.

*Third Exception.*—This was taken to the ruling by the Circuit Court upon the prayers.

By granting the plaintiff's prayer and the *fourth* prayer of the defendants, the jury were instructed that they might find for the plaintiff "in such damages, if any, as

shall appear from the evidence that he has actually and necessarily or directly sustained by reason of the granting and serving of the writ of injunction. They were further instructed that actual, natural and proximate damages are such as are the direct, necessary and natural result and effect of the act complained of, and from which injury is alleged to have been sustained."

The *seventh prayer* of the defendants which was granted, excluded from the computation of damages, all evidence of the rental value of the brick stable if it had been completed. These instructions we think left to the jury the question of the items and measure of damages in a way, of which the defendants have no good cause to complain.

The defendants' first prayer was properly refused, the several items or causes of damage therein enumerated and sought to be excluded from the consideration of the jury, were losses and injuries naturally resulting from the wrongful act of the defendant Lange, and coming within the terms and conditions of the bond; some of them were set forth in the declaration. The prayer in the form in which it was asked could not properly be granted.

The second, third and eighth prayers of the defendants seem to have been intended to present the proposition that it was the duty of the plaintiff, after he was stopped by the injunction to use reasonable diligence and care to prevent or diminish the damages and loss resulting therefrom—and that for such damage as was caused by his own wilful acts or negligence he is not entitled to recover. The general principle that a plaintiff cannot recover for damages caused by his own act, or to which he has contributed by his own negligence is well settled. These prayers, however, do not distinctly present this question. They are erroneous in denying all right of recovery, whereas, the ground of defence relied on can go no farther than to mitigate or diminish the damages to the extent they may have resulted from the negligence of the plaintiff; where

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Lange and Appel vs. Wagner.

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there is evidence of such negligence. In this case we think besides the objection to these prayers, just stated, there was really no evidence of any wilful act or contributory negligence on the part of the plaintiff, whereby the damage and loss was caused or increased.

The defendants' fifth prayer was also properly refused. There was evidence of extra labor and money expended by the plaintiff to prevent injury to the cattle. It was proved that the weather-boarding which had been removed from the old stable was nailed on again; and there was also evidence that the cattle required more food, and extra care when deprived of shelter, and also that having to buy food for them in less quantities, it cost more.

The defendants were not injured by the rejection of their *sixth* prayer, as by granting the ninth prayer, the jury were instructed that the proceedings in the injunction case were evidence only for the purpose of showing that the injunction was issued at the instance of Lange and that it had been dissolved and for no other purpose.

Finding no error in the rulings of the Circuit Court, the judgment will be affirmed with costs.

*Judgment affirmed with costs.*

(Decided 15th July, 1879.)

## JOHN T. JOHNS vs. JOHN MARSH.

*What is necessary to sustain an Action for Malicious Prosecution—Insufficiency of Prayers submitting the question of Malice and want of Probable Cause to the Jury—Province of Court and Jury—What constitutes Probable Cause—A prayer calling attention to and emphasizing certain facts, held Erroneous.*

In order to maintain the action for malicious prosecution, it is incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously and without probable cause.

These ingredients are essential to the right of action, and if they are not found to co-exist, the action is not maintainable.

While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet, any motive other than that of instituting the prosecution for the purpose of bringing the party to justice, is a malicious motive on the part of the person who acts under the influence of it.

In an action for malicious prosecution, the defendant prayed the Court to instruct the jury, that their verdict must be for the defendant, unless they should find that he was actuated by malice, and also that he acted without reasonable or probable cause in instituting the criminal proceeding against the plaintiff.

HELD :

- 1st. That this prayer was too abstract in form to have enlightened the jury as to what constituted malice in the sense of that term as applied to said action.
- 2nd. That the prayer was also defective in submitting to the finding and conclusions of the jury, the question as to what did or did not amount to probable cause.
- 3rd. That while the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be derived therefrom, really exist, it is for the Court to determine whether upon the facts so found, there be probable cause, or the want of it.

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Johns vs. Marsh.

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Probable cause is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion.

Mere belief that cause existed, however sincere that belief may have been is not sufficient.

Case where probable cause was held not to exist.

A prayer merely calling attention to and emphasizing certain items of evidence as tending to prove certain facts are liable to abuse and calculated to mislead the jury.

APPEAL from the Circuit Court for Baltimore County.

The case is stated in the opinion of the Court.

*Exception.*—At the trial the plaintiff offered nine prayers all of which were rejected and not inserted in the record except the following, which were conceded by the defendant:

7. If the jury shall find that the plaintiff was indicted, tried and acquitted in the Circuit Court for Baltimore County, on the charge set forth in the record of that Court, and the docket entries read in evidence, and shall find that the defendant, Johns, aided and assisted in procuring the arrest and prosecution of the plaintiff, by voluntarily appearing before the grand jury for the purpose of instigating the same, and aided and contributed to such prosecution in any way, under such circumstances as would not have induced a reasonable and dispassionate man to have undertaken such prosecution from public motives, then there was no probable cause for such prosecution, and the jury may infer, in the absence of sufficient proof to satisfy them to the contrary, that said prosecution was malicious in law, and their verdict may be for the plaintiff.

8. If the jury find for the plaintiff, the measure of damages is such an amount as they find will compensate the plaintiff for his actual outlay and expenses about his defence in the criminal trial, and for his loss of time, and for the injury to his feelings, person and character by his arrest and prosecution, by reason of the defendant's wrongful act, and may also award exemplary or punitive damages as a punishment to the defendant.

And the defendant offered the following prayers:

1. That the verdict must be for the defendant unless the jury shall find that the defendant was actuated by malice, and also that he acted without reasonable and probable cause in instituting the criminal charge against the plaintiff, which has been offered in evidence.

2. That if the jury shall find that the defendant was not actuated by malice in instituting said prosecution, then the verdict must be for the defendant.

3. That if the jury shall find that the defendant consulted counsel, and laid all the facts within his knowledge, or which by the exercise of reasonable diligence he could have ascertained, before said counsel, and that he was thereupon advised by said counsel, it was a proper case to be laid before the grand jury, those facts are evidence tending to prove the absence of malice on the part of the defendant.

4. That reasonable and probable cause means such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused was guilty of the crime imputed to him. And if they shall find in this cause that the defendant had such reasonable and probable cause for the accusation which was made against the plaintiff, then their verdict must be for the defendant.

5. That if the jury shall find that the defendant was present at the trial of the case of Louisa J. Marsh against the defendant, and that upon said trial he understood the

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Johns vs. Marsh.

plaintiff to testify that the license to keep an ordinary in Carroll County in the year 1872, was issued in the name of Louisa J. Marsh, and not in the name of the plaintiff, and they shall further find that the defendant afterwards ascertained that the license was in the name of the plaintiff and not in the name of Louisa J. Marsh, and that acting upon a belief that the plaintiff had so sworn contrary to the fact, the defendant laid information of these facts before the grand jury, and also furnished them with the names of other witnesses who could testify that the plaintiff had sworn at said trial that the license was in the name of Louisa J. Marsh, then there was reasonable and probable cause for the defendant to lay said information before the grand jury, even though the jury may believe that in point of fact the plaintiff swore, or meant to be understood as swearing at said trial, that the license in question had been issued in his own name.

5½. That if the jury shall find that the defendant was present at the trial of the case of Louisa J. Marsh against the defendant, and that upon said trial he understood the plaintiff to testify that the license to keep an ordinary in Carroll County in the year 1872, was issued in the name of Louisa J. Marsh, and not in the name of the plaintiff, and they shall further find that the defendant afterwards ascertained that the license was in the name of the plaintiff, and not in the name of Louisa J. Marsh, and that acting upon the belief that the plaintiff had so sworn contrary to the fact, the defendant laid information of these facts before the grand jury, and also furnished them with the names of other witnesses who could testify that the plaintiff had sworn at said trial that the license was in the name of Louisa J. Marsh, then said facts, if believed by the jury, are evidence tending to prove the absence of malice on the part of the defendant, even though the jury may believe that in point of fact the plaintiff swore, or meant to be understood as swearing on said trial,

that the license in question had been issued in his own name.

6. That if the jury shall find from the evidence in the cause, that the defendant appeared before the grand inquest of the State of Maryland, for the body of Baltimore County, and informed the said grand inquest that at the September term, 1874, of the Circuit Court for Baltimore County, during the trial in said Court of a case in which Louisa Jane Marsh, by her next friend, John Marsh, was plaintiff, and John T. Johns, was defendant, the plaintiff, (John Marsh,) had testified under oath that a certain license to keep an ordinary in the town of Manchester, in Carroll County, in the State of Maryland, from the 1st day of May, 1872, to the 1st day of May, 1873, had been issued to and in the name of Louisa Jane Marsh, and that he, the defendant, had been informed since said John Marsh, the plaintiff, had so testified, that in truth and in fact said license to keep an ordinary in the town of Manchester during said period had not been granted to and in the name of Louisa Jane Marsh, and that the defendant informed the grand inquest that he wished them to investigate the matter and see if there was anything wrong about it, and that when the defendant was asked by a member of said grand inquest, whether he wished them to see whether there had been any perjury, the defendant replied "yes;" that if in addition to the above facts, the jury shall find from the evidence in the cause, that at the time the defendant so appeared before the said grand inquest and requested them to make said investigation, he acted upon such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the fact that the plaintiff, John Marsh, had so testified, taken into connection with the truth as to the issuing of said license to keep an ordinary in said town of Manchester, from the 1st day of May, 1872, to the 1st day of May, 1873, was a proper sub-



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Johns vs. Marsh.

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ject to be investigated by said grand inquest, in order that they might see whether the crime of perjury had or had not been committed by said John Marsh, that then there was probable cause to justify the defendant's conduct, in connection with the alleged arrest and the alleged prosecution of the plaintiff, and their verdict must be for the defendant.

And the plaintiff objected to the defendant's first, third, fourth and sixth prayers, on the ground that there was no legally sufficient evidence in the case on which to base the same.

And he objected to defendant's first and fourth prayers on the ground that each put to the jury matter of law.

The Court (YELLOTT, J.) granted the plaintiff's seventh and eighth prayers which were conceded by the defendant, and overruled the defendant's first, second, fourth, fifth and fifth and a half prayers, and granted the defendant's third and sixth prayers. The defendant excepted, and the verdict and judgment being against him, appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER and ALVEY, J.

*Henry V. D. Johns* and *Wm. M. Merrick*, for the appellant.

The law is uniform and characteristic of this action, that both malice and the want of probable cause must co-exist before a recovery can be had, and that the law of that prayer is not embraced by any of the instructions which were granted. *Boyd vs. Cross*, 35 Md., 194; *Metcalf vs. Brooklyn L. I. Co.*, 45 Md., 198; *Stansbury vs. Fogle*, 37 Md., 370-386.

The law is uniform that malice must be proved, and the rejection of the defendant's second prayer was in violation of that fundamental principle.

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Johns vs. Marsh.

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The Court erred in refusing the defendant's fifth prayer, because the facts embraced by its hypothesis, if found, would clearly make a case of probable cause in law.

As to the fifth and a half prayer, the facts therein recited would tend to repel the imputation of malice, and the defendant was entitled to have the benefit of the Court's instruction that those facts had a tendency to disprove malice, quite as well as the fact of the absence of probable cause tends to prove the existence of malice, as stated in the plaintiff's seventh prayer. *McWilliams vs. Hoban*, 42 Md., 65.

*John J. Yellott* and *Wm. P. Maulsby*, for the appellee.

The defendant's first, second and fourth prayers were properly rejected for various reasons.

1st. Because they were abstract propositions. *Newman vs. McComas*, 43 Md., 70; *State vs. Deford*, 30 Md., 179; 40 Md., 212; *B. & O. R. R. Co. vs. Resley*, 14 Md., 424.

2nd. They submitted to the jury matters of law. It is for the Court in these cases to say what particular facts constitute probable cause, and the province of the jury is limited to ascertaining the existence of these particular facts. *Newman vs. McComas*, 43 Md., 70; *Boyd vs. Cross*, 35 Md., 194; *Stansbury vs. Fogle*, 37 Md., 370; *McWilliams vs. Hoban*, 42 Md., 56.

The question of malice in these cases is properly to be referred to the jury, but as the term has a different meaning in law and in common parlance, the jury should be instructed as to its legal meaning. The general character of the prayer made it misleading and capable of mischief. 1 *Am. Leading Cases*, 274; *Purcell vs. McNamara*, 9 East, 361; *Stockley vs. Harnidge*, 8 Carr. & Payne, 11, (34 E. C. L., 272.)

3rd. The fourth prayer was not only objectionable because improper in form and submitted to the jury matter of law, but the Court should have rejected it, because the

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Johns vs. Marsh.

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defendant received the full benefit of the proposition it contained in the plaintiff's conceded prayer, and in the defendant's sixth prayer, which was granted. It being fully embraced therein there was no error in its rejection. *Pettigrew vs. Barnum*, 11 *Md.*, 434; 40 *Md.*, 212.

The fifth and fifth and a half prayers are both most defective.

1st. They are not based upon the evidence in the cause, and should therefore have been rejected. *Maltby vs. N. W. Va. R. R. Co.*, 16 *Md.*, 422; *Cecil Bk. vs. Snively*, 23 *Md.*, 253; *Hurt vs. Woodland*, 24 *Md.*, 393.

2nd. They are framed upon a forced construction of a portion of the defendant's testimony segregated from the rest, and entirely ignoring the testimony of the plaintiff. *Winner vs. Penniman*, 35 *Md.*, 163; *Md. Fertilizing Co. vs. Lorentz, &c.*, 44 *Md.*, 218.

There is no evidence in the cause whatever that Johns ever heard Marsh testify that the license was in his wife's name, but upon the contrary, he supposed that his silence gave consent, and in the latter part of his testimony, he swears positively that when the criminal cause was tried, he did not know what Marsh had sworn to about the license.

3rd. These prayers rest upon the *mere belief* of the defendant at the time, that Marsh had sworn contrary to the truth, without any regard to the *bona fides* and honesty of such belief. In a case of this kind, *mere belief* can avail the defendant nothing, unless it was honestly entertained and rested upon circumstances sufficiently strong in themselves to warrant a cautious and dispassionate man therein. Granting that Johns did hear Marsh testify as stated in the prayers, then it was for the jury to find whether, under all the circumstances surrounding the matter, a prudent and cautious man would have instigated the prosecution or gone before the Grand Jury; that feeling personally "aggrieved," he may have given credit to weak circum-

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Johns vs. Marsh.

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stances and a significance to the nod of a man's head, which no cautious man would have acted upon. 1 *Am. Leading Cases*, 266; *Walker vs. Turner*, 3 *G. & J.*, 377.

The defendant's fifth prayer enumerates several facts which are alleged to constitute probable cause; they are, in substance, that if the defendant *understood* the plaintiff to have testified to a certain fact, on the previous trial in question, and acting on that belief, instituted the prosecution against the plaintiff for perjury, such belief was probable cause, although the plaintiff had not, in fact, testified as the defendant had understood him to do.

This falls far below the definition of probable cause, omitting the *reasonableness* of ground of suspicion, the support of that reasonableness by *circumstances* sufficiently strong in themselves to have warranted a *cautious man* in believing that the plaintiff had committed perjury. *Straus vs. Young*, 36 *Md.*, 246; *B. & O. R. R. vs. State*, 36 *Md.*, 366; *Medcalf vs. Brooklyn L. I. Co.*, 45 *Md.*, 198.

The whole case was covered by the four instructions granted. The plaintiff's seventh prayer was the conceded law of the case. It imposed upon the plaintiff the burden of proving every necessary fact to sustain a case for malicious prosecution. The defendant's third prayer gave to him the full benefit of the supposed evidence, that he acted upon the advice of counsel. His sixth prayer, which was granted, placed the case fully and fairly before the jury upon the defendant's theory of the law and the facts involved. There having been a full and fair trial upon the law and the facts, there is no sufficient reason for a reversal of the Court below for any possible technical defect in its rulings. *Cooper vs. Utterbach*, 37 *Md.*, 282.

ALVEY, J., delivered the opinion of the Court.

This was an action for malicious prosecution, brought by the appellee against the appellant. The rulings of the Court below, to which errors are imputed, are those by

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Johns vs. Marsh.

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which five of the seven prayers offered by the defendant for instructions to the jury were overruled. The two instructions given at the instance of the plaintiff were conceded by the defendant, and they, together with the third and sixth prayers granted on the part of the defendant, constituted all the instructions that were given to the jury. And, upon examination, it would appear that the defendant obtained, in the instructions thus given, the full benefit of all the principles of law that he could in reason ask to have applied to the case.

By the first of the prayers rejected, of those offered by the defendant, the Court was asked to say to the jury that their verdict must be for the defendant, unless they should find that the defendant was actuated by malice, and also that he acted without reasonable and probable cause, in instituting the criminal proceeding against the plaintiff. Now, however correct in principle this proposition may be, in its abstract form, and as offered in this prayer, it could hardly have been a safe guide for the jury. It is doubtless true, and not at all controverted by the plaintiff, that, in order to maintain the action, it was incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously, and without probable cause. These ingredients were essential to the right of action, and if they were not found to co-exist the action was not maintainable. And while the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet, any motive other than that of instituting the prosecution for the purpose of bringing the party to justice, is a malicious motive on the part of the person who acts under the influence of it. As was accurately stated by Mr. Justice PARKE, afterwards Baron PARKE, in the case of *Mitchell vs. Jenkins*, 5 B. & Ad., 594, "the term 'malice,' in this form of action, is not

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Johns vs. Marsh.

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to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." If, for example, a prosecution is initiated upon weak and unsubstantial ground for purposes of annoyance, or of frightening and coercing the party prosecuted into the settlement of a demand, the surrender of goods, or for the accomplishment of any other object, aside from the apparent object of the prosecution and the vindication of public justice, the party who puts the criminal law in motion under such circumstances lays himself open to the charge of being actuated by malice. Such motives are indirect and improper, and for the gratification of which the criminal law should not be made the instrument. *Add. on Torts*, pp. 594, 613; 2 *Greenl. Ev.*, sec. 453. Taking then the term "malice" in the sense as here explained, it is quite obvious the prayer of the defendant was too abstract in form, and would not have enlightened the jury as to what constituted malice in the sense of that term as applied to this action; but the jury would have been at liberty to adopt their own notion as to the extent and meaning of the term. Without any instruction at all upon the subject, explaining the sense in which the term should be applied, the jury would most likely take it in its popular and restricted sense of personal enmity, and desire of revenge. Of this, however, the defendant could not complain. But the prayer is defective in another particular. It required the jury to find, as a condition upon which they could render a verdict for the plaintiff, that the defendant had acted without reasonable and probable cause in instituting the criminal proceeding. Now, while it is perfectly well settled, that if there be reasonable or probable cause, to the knowledge and honest belief of the defendant, no malice, however flagrant or distinctly proved, will make the defendant liable, yet the question as to what does or does not amount to probable cause is not one to be

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Johns vs. Marsh.

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submitted to the finding and conclusions of the jury. That question is one compounded of law and fact; and while the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be drawn therefrom, really exist, it is for the Court to determine whether, upon the facts so found, there be probable cause or the want of it. *Boyd vs. Cross*, 35 Md., 194; *Cooper vs. Utterbach*, 37 Md., 283, 317; *Stansbury vs. Fogle*, 37 Md., 386; 1 *Tayl. Ev.*, p. 40, and cases there cited. In view of this well established principle, the prayer was properly rejected, even if it had been free from all other objections.

Then, as to the second prayer of the defendant, also rejected. What has been said in considering the first prayer, in respect to the question of malice, equally applies to this. By this prayer, the Court was requested to instruct the jury, that if they should find that the defendant was not actuated by malice in instituting the prosecution, their verdict should be for him. This result was provided for in the prayer offered by the plaintiff, which was conceded by the defendant, and upon which there is and can be no question raised on this appeal. By that prayer, the jury were instructed that it was competent for them to infer malice from the want of probable cause as therein defined, if the existence of malice was not negatived by the proof before them; and it was only in the event of finding the existence of malice, that the verdict could be found for the plaintiff according to the instruction. There was, therefore, no occasion for the instruction asked for by the second prayer, unless it had furnished the jury with an explanation of the sense in which the term "malice" should have been applied. But that, as we have seen, it failed to do.

It being conceded that the defendant got the full benefit of his fourth prayer, which was rejected, in his sixth prayer, which was granted, a reversal is not claimed, nor

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Johns vs. Marsh.

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could it be, for any supposed error in rejecting the fourth prayer. And passing over the fourth prayer, we come to the fifth, which was also rejected. This prayer presented the question as to what facts, if found by the jury, would constitute probable cause. By this prayer, the Court was asked to instruct the jury, that if they found that the defendant understood the plaintiff to swear contrary to the fact in regard to the license, and, acting upon that belief, he laid the charge before the grand jury, that those facts constituted probable cause, notwithstanding such belief was founded wholly in misapprehension or mistake in point of fact. The Court below was certainly right in declining to affirm this proposition.

Probable cause, according to the definition adopted by this Court, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing that the accused was guilty. *Boyd vs. Cross*, 35 Md., 197; *Cooper vs. Utterbach*, 37 Md., 282, 318. It is very true, probable cause does not depend on the actual state of the case, in point of fact, as it may turn out upon legal investigation. It is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant, or any reasonable person, to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were, in good faith, the reason and inducement for his putting the law in motion. *Delegal vs. Highley*, 3 Bing. N. C., 950; *McWilliams vs. Hoban*, 42 Md., 57; 2 Greenl. Ev., sec. 455. Mere belief that cause existed, however sincere that belief may have been, is not sufficient; for, as said by Judge COOLEY, one may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; there must be such grounds of belief, founded upon the actual knowledge of facts, as would



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Johns vs. Marsh.

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influence the mind of a reasonable person, and nothing short of this can justify a serious and formal criminal charge against another. *Cooley on Torts*, 182. The defendant here was the defendant in the cause in which it was supposed the plaintiff had committed perjury. He was present in Court and heard the testimony, and he was therefore not liable to be misled or imposed upon by any mere report of what occurred. As witness for himself in this case he has stated what he understood the plaintiff's testimony to have been on the occasion referred to. He says "that when the plaintiff was called as a witness he stated that he was carrying on business as agent for his wife; that Mr. McIntosh, the counsel, then said, 'then the license is in your wife's name;' and that Marsh made no reply, but bowed his head, and he, defendant, supposed that silence gave consent; that Marsh did not deny that the license was in his wife's name, and that he, defendant, paid no more attention to what was said, and thinks he has given the substance of Marsh's testimony." Having himself heard this testimony, assuming that he is correct in his recollection of it, it was not, to say the least of it, a charitable construction, and one that a discreet, careful man would readily adopt, to conclude, on learning that the license was not in the name of the wife, that Marsh had committed wilful and corrupt perjury. But if we assume, as the prayer does, that Marsh, the plaintiff, swore, or meant to be understood as swearing, at the trial referred to, that the license in question had been issued in his own name, and not that of his wife, there is no ground whatever for saying that there was probable cause to the knowledge and belief of the defendant. Even if there were circumstances of suspicion in the mind of the defendant which might have been readily removed or explained, by reasonable and proper inquiry, and there was no inquiry made, such circumstances cannot be made the ground for showing the exist-

ence of probable cause. *Perryman vs. Lister*, *L. Rep.*, 3 *Exch.*, 197, *Exch. Ch.*; *S. C.*, 4 *L. Rep.*, *H. L.*, 521; *Add. on Torts*, 592. However confident or strong therefore the belief of the defendant may have been in regard to the existence of probable cause for the prosecution, if that belief was induced by his own negligence, or from error or mistake as to the real state of the facts, without just cause of suspicion furnished by the plaintiff, the proof of probable cause must fail. *Merriam vs. Mitchell*, 13 *Me.*, 439; 1 *Am. L. Cas.*, (3rd Ed.,) 221; 2 *Greenl. Ev.*, sec. 455. The prayer proceeds upon the concession that the defendant, in initiating the prosecution against the plaintiff, acted upon a mistake or misapprehension of the facts, and that the real fact was the reverse of what the defendant represented it to be. It is insisted, however, inasmuch as the defendant at the time believed in the truth of the state of case as he presented it, it therefore constituted probable cause. But, in regard to such proposition, both reason and authority are conclusive against the defendant.

The prayer No. 5 $\frac{1}{2}$  contains the same enumeration of facts as prayer No. 5, and asked that the Court would instruct the jury, that those facts, if believed, were evidence *tending* to prove the absence of malice on the part of the defendant, even though it might be found that the plaintiff swore that the license had been taken out in his own name, and not that of his wife.

Prayers of this character, merely calling attention to and emphasizing certain items of proof as *tending* to prove certain facts, have been repeatedly condemned by this Court as being liable to abuse, and as calculated to mislead the jury. The Court in ruling the evidence admissible, on a general offer, allows it to be considered and weighed for all the legitimate purposes of the case; and its force and bearing as means of proving or disproving any particular fact in contest is exclusively for the jury. If a prayer of this character could be entertained in respect

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Sumwalt *vs.* Sumwalt, *et al.*

to one fact or circumstance, it could be in respect to any other in the case, down to the remotest and the most minute; and if in respect to circumstances in support of any particular fact, it would be proper so to instruct in respect to all opposing or adverse facts and circumstances. This would lead to manifest abuse. The refusal of such prayers was approved by this Court in the cases of *Hurt vs. Woodland*, 24 Md., 394, and *Mason vs. Poulson*, 40 Md., 355, and we can see no good reason why we should depart from the rule of practice thus sanctioned.

Upon the whole, we find nothing in any of the rulings appealed from that requires a reversal, and we must therefore affirm the judgment.

*Judgment affirmed.*

(Decided 15th July, 1879.)

ELIZABETH SUMWALT *vs.* SAMUEL SUMWALT and others.

*Construction of Art. 93, sec. 250, of the Code, relating to the framing of Issues in the Orphans' Court—Province of the Orphans' Court in such Cases—Rule given for the framing of Issues and prohibiting the granting of Several issues raising the same substantial question—Case of issues improperly granted because obnoxious to said rule.*

Sec. 250, of Art. 93, of the Code, requires the Orphans' Court in all cases of controversy therein, if either party require it, to direct an issue or issues to be made up and sent to any Court of law convenient for trying the same. **HELD:**

1st. That the obvious purpose of this provision is to enable the Orphans' Court to advertise itself of the real facts of the case. These when found by the jury are conclusive upon the Orphans' Court, which has no discretion, but must enter the judgment in conformity with the finding of the jury.

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Sumwalt vs. Sumwalt, *et al.*

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2nd. That in framing issues, it is the duty of the Orphans' Court to present the questions of fact in dispute and to be determined by the jury, in a plain and clear way. There is an obvious impropriety in multiplying the issues unnecessarily, and especially in presenting the same substantial question in two separate and distinct issues.

On a caveat to a will, the first issue granted by the Orphans' Court, presented the question whether the execution of a paper purporting to be the will of S., was "procured by undue influence practised upon him." **HELD:**

That it was error to grant a second issue presenting the question whether the execution of said paper was obtained from the said S., "by the exercise of a dominion or influence by some person or persons which prevented the exercise of a sound discretion on the part of the said S."

It is not the province of the Orphans' Court to define the nature or degree of influence which will render a will void.

The third issue granted presented the question whether said paper-writing was "revoked after the making and execution thereof." **HELD:**

1st. That the questions raised by two other issues, as to the effect of certain deeds mentioned therein, and whether they operated to revoke said will, were questions which arose under, and were properly presented by, the third issue; and said issues were improper to be granted.

2nd. That what would be the effect produced by a fraudulent concealment of said will to prevent its being cancelled or destroyed, was a question which could properly be raised under the third issue, and ought not to be made the subject of a further and distinct issue.

APPEAL from the Orphans' Court of Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON and IRVING, J.

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Sumwalt vs. Sumwalt, et al.

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*John V. L. Graham* and *Thomas J. McKaig, Jr.*, for the appellant.

The second issue being substantially the same as the first, it is, therefore, calculated to mislead the minds of the jury.

In *Pegg, et al. vs. Warford*, 4 Md., 385, it was held, that "in an appeal from an order of the Orphans' Court, awarding the same issue a second time, this Court would be bound to denounce it as utterly void and as of none effect." And while it is true that, in that case, the question was, whether a second set of caveators had a right to require the sending to a Court of law of the same issue previously granted to another set of caveators, the application of the principle in this case differs only in degree. The danger of two different juries finding different verdicts on the same issue is simply greater than that the same jury will find different verdicts on the same issue, differently expressed and twice submitted to them.

*Importunity* or *undue influence* is a legal term, and its proper definition or degree thereof sufficient to invalidate a will, is alone within the province of the Court to determine. It was simply because the Orphans' Courts of this State are rarely, if ever, composed of Judges learned in the law, that the General Assembly enacted section 250, Art. 93, of the Code, requiring this Court "in all cases of controversy therein, if either party required it, to direct an issue or issues to be made up and sent to any Court of Law convenient for trying the same." It would therefore be a most anomalous proceeding on the part of the Orphans' Court, in framing the issue to be sent to the Court of Law, to decide in advance possibly the most important and vital question of law involved in the trial of the issue. We would then have, in a majority of cases, not only the danger but the certainty of the Orphans' Court fixing in the issue one standard or degree of undue influence sufficient to invalidate a will, and the

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Sumwalt *vs.* Sumwalt, *et al.*

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Court of law to which the issue is sent, establishing another and quite a different one at the trial.

But conceding for the sake of the argument, that the Orphans' Court possesses this right, then it is certainly incumbent on it to define properly and correctly the degree of importunity or undue influence requisite to invalidate a will—and this the Orphans' Court, in this second issue, has utterly failed to do.

In Maryland, the law is now settled by an unbroken current of decisions that "the influence to vitiate a will must be an unlawful influence and exerted to such a degree as to amount to *force or coercion, destroying free agency and tantamount to force or fear.*" *Higgins, et al. vs. Carlton and Scaggs*, 28 Md., 118; *Tyson, et al. vs. Tyson, Ex.*, 37 Md., 588; *Wittman and Wife, et al. vs. Goodhand, Adm'x*, 26 Md., 95; *Davis vs. Calvert*, 5 G. & J., 302; 2 *Greenleaf on Evidence*, sec. 688, and cases there cited; 1 *Jarman on Wills*, 123.

The "prevention of the exercise of a sound discretion," the definitive words used in this second issue, are therefore very far from expressing the decree of importunity or undue influence requisite to vitiate the last will and testament of David S. Sumwalt; and for the caveatee to go into the trial of this issue upon such a definition of undue influence, would simply be an abandonment on her part of the protection afforded her by the principle established by the Court of Appeals in the above cited cases.

The caveators' sixth issue is simply an immaterial and irrelevant issue, and for that reason should not have been granted. *Munnikhuisen vs. Magraw*, 35 Md., 280.

The prevention of the testator from revoking his will by the fraudulent concealment of any one, is not sufficient in law to operate as a revocation of his will, and if so found by the jury would not authorize the Orphans' Court to set aside the will. The true principle deduced from all the adjudicated cases in this country and England, is, that

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Sumwalt vs. Sumwalt, et al.

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in addition to the *intention* to revoke, there must be the *act* of burning, cancelling, &c., before a revocation under the statute can be effected. *Hise vs. Fonder*, 10 *Ired.*, 139; *Doe dem. Read vs. Harris*, 6 *Adolph & El.*, 209; *Malone vs. Hobbs*, 1 *Rob.*, (Va.), 346; *Runkle vs. Eaton*, 11 *Ind.*, 98; *Boyd vs. Cook*, 3 *Leigh*, (Va.), 32.

A. W. Machen, for the appellees.

There seems to be no question brought up on this appeal which has not been concluded by previous decisions. adversely to the contention of the appellant.

In the case of *Warford vs. Van Sickle*, 4 *Md.*, 397, where there was, as here, an appeal from an order granting issues, the issues, six in number, all relating to the will of Rachel Colvin of 6th April, 1848, came under the consideration of the Court of Appeals, and it was expressly held that the last three, that is to say the fourth, fifth and sixth, were properly granted.

The fourth issue in that case is identical with the *second* issue in the present case, and the *sixth* issue in this case is substantially the same as the sixth in that, and exactly the same as the sixth issue relating to Rachel Colvin's will of 1845, which distinctly received the sanction of the Court of Appeals in *Pegg vs. Warford*, 4 *Md.*, 386, 395.

These two are the only issues prayed by the caveators, and granted by the Orphans' Court of Baltimore County, to which any objection was made on the part of the appellant in the Court below, or to which any exception is addressed in the brief of her counsel.

The special objection, that the first and second issues both involve the same general question as to the obtaining of the execution of the will of 1850 by improper influence, cannot be allowed any force at this day.

The great case of *Pegg vs. Warford*, 4 *Md.*, 385, contained the same feature, and indeed—more particularly in the issues granted upon the application of *Landis and*

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Sumwalt *vs.* Sumwalt, *et al.*

*others*, 4 *Md.*, 387—the very same *combination* of issues which exists here. See also *Warford vs. Van Sickle*, 4 *Md.*, 397.

So far as any opinion was expressed by the Court of Appeals, in the appeal from the instructions at the trial of the issues, in *Pegg vs. Warford*, 7 *Md.*, 582, 609, it strongly indicates that, in this State, the law is, that fraudulent concealment of a will which would otherwise have been cancelled, may be equivalent to a revocation. The point seems to have been conceded by the able counsel of the caveatees. See 7 *Md.*, 602, as to the third exception.

BARTOL, C. J., delivered the opinion of the Court.

This is an appeal from the Orphans' Court of Baltimore County. It appears by the record that David S. Sumwalt died on the 4th day of November 1878, leaving a paper, purporting to be his last will bearing date the 16th day of October 1850.

Before the alleged will was offered for *probate*, Samuel Sumwalt the brother of the deceased filed his petition in the Orphans' Court, alleging that he has been advised that Elizabeth Sumwalt, widow of the deceased, who for the last eighteen years of his life, lived separate and apart from him under a deed or agreement for separation, has threatened to exhibit and propound for probate, a certain paper-writing purporting to be a last will and testament of said David, and the petitioner being desirous of contesting the validity and sufficiency of the alleged testamentary paper, if the same should be offered, filed his caveat thereto, and prayed that it may be inquired and determined whether said paper-writing is in truth and fact the last will and testament of David S. Sumwalt, and (if the same should be found to have been executed by said deceased, which is not admitted,) whether or not the execution of the same was procured by fraud or undue



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Sumwalt vs. Sumwalt, *et al.*

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influence; and also whether or not the said writing was, subsequently to the making thereof, revoked by the said deceased and annulled; and whether or not the said Elizabeth Sumwalt, by fraud and concealment, prevented the said deceased from cancelling the same.

On the 27th day of November 1878, Mrs. Sumwalt, the widow filed in the Orphans' Court, the will of her late husband, devising to her all his estate and property and appointing her executrix.

On the 4th day of December she filed her answer to the petition and caveat of Samuel Sumwalt—alleging that the will was duly executed, and denying that the execution of the same was procured by fraud or undue influence practiced upon the testator, or that the same had been revoked or annulled by him, or that he was in any manner prevented by any fraud or concealment of the respondent from cancelling the same.

On the same day a petition and caveat was filed by Joshua B. Sumwalt and others, next of kin to the deceased, alleging that the said testamentary paper, if it had ever been executed by the deceased, (which the caveators do not admit) had been subsequently wholly revoked and annulled.

A petition was then filed by all the caveators, praying that certain issues proposed by them, should be sent to a Court of law for trial. These issues did not involve the question of the execution of the paper by the deceased. They were as follows:

1st. Was or not the execution of the said paper-writing, dated October 16th 1850, and purporting to be the last will and testament of the said David S. Sumwalt procured by undue influence practiced upon him?

2nd. Was or not the execution of said paper-writing, dated October 16th 1850, obtained from the said David S. Sumwalt, by the exercise of a dominion or influence by some person or persons, which prevented the exercise of a sound discretion, on the part of said David S. Sumwalt?

*Sumwalt vs. Sumwalt, et al.*

3rd. Was or not the said paper-writing, dated the 16th day of October 1850, and purporting to be the last will and testament of the said David S. Sumwalt, revoked after the making and execution thereof?

4th. Was or not the said paper-writing, dated October 16th 1850, and purporting to be the last will and testament of David S. Sumwalt, revoked by an indenture dated the third day of October in the year eighteen hundred and sixty, made between the said David S. Sumwalt and Elizabeth Sumwalt, his wife, of the first part, George W. Davis, Trustee, of the second part, and George H. Brice and Charles W. Ridgely of the third part?

5th. Was or not the said paper-writing, purporting to be the last will and testament of the said David S. Sumwalt, dated October 16th 1850, revoked by an indenture dated the fifth day of June, in the year eighteen hundred and fifty-one, made between the said David S. Sumwalt of the first part, and George W. Davis of the other part?

6th. Was or not the said David S. Sumwalt prevented, by the fraudulent concealment by any person or persons, of the said alleged will of him, the said David S. Sumwalt, dated October 16th 1850, from revoking the same, by burning, cancelling or otherwise?

The caveatee objected to the second and sixth issues; and proposed *five* issues in lieu of those suggested by the caveators. Of these the first, second, third and fourth were identical with the first, third, fourth and fifth offered by the caveators.

The caveatee objected to the fifth issue proposed by the caveators as wholly irrelevant and improper; but in the event of this objection not being sustained, she proposed in lieu thereof the following:

5th. Was or not the said David S. Sumwalt prevented from revoking said alleged will, by burning, cancelling, tearing or obliterating the same, by the fraudulent concealment of any person or persons, and if so, was such

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Sumwalt vs. Sumwalt, et al.

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fraudulent concealment sufficient in law to operate a revocation of said last will and testament?

The Orphans' Court by its order granted the six issues, as prayed by the caveators, and refused to grant the *fifth* issue as proposed by the caveatee, and from that order the present appeal was taken.

The proceeding in this case is under Art. 93, sec. 250, of the Code, which requires the Orphans' Court, in all cases of controversy therein, if either party requires it, to direct an issue or issues to be made up, and sent to any Court of law convenient for trying the same.

The obvious purpose of this provision as said in *Cain vs. Warford*, 3 Md., 462, and *Pegg vs. Warford*, 4 Md., 393, is "to enable the Orphans' Court to advertise itself of the real facts of the case." These when found by the jury are conclusive upon the Orphans' Court, which has no discretion, but must enter the judgment in conformity to the finding of the jury. *Pegg vs. Warford*, 4 Md., 394; *Brown vs. Brown*, 22 Md., 110; *Waters vs. Waters*, 28 Md., 24.

In framing issues it is the duty of the Orphans' Court to present the questions of fact in dispute, and to be determined by the jury, in a plain and clear way; there is obvious impropriety in multiplying the issues unnecessarily, and especially in presenting the same substantial question in two separate and distinct issues. In *Pegg vs. Warford*, 4 Md., 385, and *Warford vs. Van Sickle*, 4 Md., 397, it was decided that after issues had been awarded at the instance of a party, it was error to award the same issues at the instance of another party, and that the latter was a void act and of no effect. This decision was made with reference to a case where caveats to a will had been filed by different parties; but the same objection applies, although perhaps not with the same force, to awarding two distinct and separate issues, in the same case, presenting substantially the same question. This objection

Sumwalt vs. Sumwalt, et al.

applies to the *first* and *second* issues prayed by the caveators. They both involve the question whether the execution of the will was procured by undue influence practiced upon the testator. So far as the second issue differs in its phraseology from the first, it is obnoxious to a still more serious objection. It is not the province of the Orphans' Court to define the nature or degree of influence exerted upon a testator, which will render his will void, and in the *second* issue as proposed, the attempted definition is vague and inaccurate, and might have the effect of misleading the jury. A will cannot be set aside because it may be shown that it was made under influences, which prevented the testator from exercising what in the estimation of a jury, would be a sound discretion in disposing of his property.

The degree and kind of influence, which if exerted upon a testator, will vitiate his will, is well understood and has often been defined by the Courts.

We do not mean to enter upon a definition of it here, to do so would be out of place on this appeal. It is sufficient to say that the question to be answered by the jury on this subject is clearly and sufficiently presented by the *first* issue, and it was error to grant the second.

With respect to the other issues, we have to say that there being no dispute as to the execution of the will, the only questions raised by the caveat are two; *first*, whether its execution was procured by undue influence, and *secondly*, was it afterwards revoked or cancelled?

These questions are fully and distinctly presented by the *first* and *third* issues proposed by the caveators; and for the purpose of a trial of the questions involved, these are all the issues which we think are proper to be granted.

The questions proposed to be raised by the *fourth* and *fifth* issues, as to the effect of the deeds therein mentioned, and whether they operated to revoke the will, are questions which arise under and are properly presented by the *third* issue.

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Sumwalt vs. Sumwalt, *et al.*

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So with respect to the *sixth* issue as proposed. That amounts to no more than a question whether the will had been cancelled or revoked. Now what effect might be produced by a fraudulent concealment of a will, to prevent its being cancelled or destroyed, if that should be shown by the evidence, we think it would be quite premature, if not improper, now to express any opinion. Whether that fact could operate as a revocation, is a question which will properly arise under the *third issue*, that is to say, was the will revoked, after the execution thereof.

We have carefully examined the several cases which have been before this Court, involving the question of framing issues in the Orphans' Court, and do not think that any of them have conclusively settled the practice in favor of the form of the several issues proposed by the caveators in this case. The particular objections which have been urged by the appellant in this case, do not appear to have been made or considered in any case to which we have been referred.

In our opinion, the correct rule to be observed, and the one which will best subserve the purposes of justice, is to grant no more than one issue presenting the same substantial question, and secondly, not to multiply the issues unnecessarily, and to grant such only as distinctly present the real questions in dispute.

We think in the present case the *first* and *third* issues prayed by the caveators sufficiently present the questions in controversy, and we shall therefore reverse the order of the Orphans' Court and remand the case for further proceedings in accordance with the views expressed in this opinion.

*Reversed and remanded.*

(Decided 15th July, 1879.)

JOSHUA F. C. WORTHINGTON *vs.* JAMES L. RIDGELY, JR., and JOSHUA F. C. WORTHINGTON, *et al.*, Executors.

*Case of issues on separate Caveats to a Will, where all the issues were grouped in one case with all the Caveators as Plaintiffs, and all the Caveatees as Defendants, although one of the parties was a Caveator in his individual capacity, and Caveatee in his capacity as Executor—The order of arrangement of the Issues a matter of form—The order of the Argument of the case prescribed—The order of introducing the Evidence a matter for the Court below to determine.*

A paper-writing purporting to be the last will of N. W., was exhibited in the Orphans' Court by J. L. R., one of the executors, and proved in the usual form by the three subscribing witnesses. Afterwards J. F. C. W., also named as one of the executors, filed a petition and caveat alleging that said paper contained in fact the true last will of N. W. but that after its execution it was fraudulently altered, without the authority or knowledge of the testator, by the insertion therein of certain words of gift to said J. L. R., the effect of which was to make the instrument appear to bestow upon said J. L. R. one-half of the whole residuary estate. D. W. W. and O. A. W. two of the heirs-at-law also filed their petition, and caveat to the entire paper exhibited, alleging that it was not executed in the manner and form required by law; that at the time it was executed, N. W. was not of sound and disposing mind; that it was the result of undue influence and undue importunities, and that it was obtained and procured by misrepresentations and by fraud and deceit. An answer to the petition and caveat of J. F. C. W. was filed by J. L. R. denying the allegation of a fraudulent alteration or interlineation of the paper in question. Separate answers were filed to the caveat of the heirs-at-law, by J. L. R., J. F. C. and J. F. C. W., the three executors named in the alleged will. J. L. R. insisted upon the validity of the entire will; J. F. C. alleged that he knew nothing of the will except what is disclosed upon its face; and J. F. C. W. in-

Worthington vs. Ridgely, Jr., et al., Ex'rs.

sisted upon its validity except as far as it was fraudulently altered as alleged in his caveat. Issues were thereupon prayed as follows: J. F. C. W., asked for four issues raising in different forms, questions as to the alteration of said paper, and its due execution and validity except as to said alteration. J. L. R. asked for one issue presenting the question as to the fraudulent alteration of said paper; and the contesting heirs-at-law asked for six issues presenting questions as to the valid execution of the paper, the sanity of the testator and the exercise upon him of undue influence, fraud, deceit and misrepresentation. All the issues asked for were allowed by the Orphans' Court, and they were grouped together in one case with J. F. C. W., and D. W. W., and O. A. W., as caveators, and J. L. R., and J. F. C. W., J. L. R. and J. F. C., executors as caveatees. On appeal it was HELD:

- 1st. That the Orphans' Court acted rightly in bringing together the several issues asked for, in the *one* case, and in designating the caveators and caveatees as they had done in its titling.
- 2nd. That although possibly it would have been more systematic, and have tended to simplify the proceedings to have arranged the issues differently from what was done, such arrangement was but matter of form and did not constitute error.
- 3rd. That it would be for the Court where the issue were tried, to allow J. F. C. W. to explain his position in the case as both caveator and caveatee, and with proper instructions granted to the jury, there could be no confusion in their finding upon the several issues.
- 4th. That as to the order of argument, the caveator, J. F. C. W., would be allowed to open upon his issues involving the alteration of the will, and the caveators D. W. W. and O. A. W., would also open upon their issues; J. L. R., the respondent to the caveat of J. F. C. W., would reply, and also the counsel for the will; J. F. C. W. was then entitled to close on his issues, and D. W. W. and O. A. W. upon theirs. Thus upon both caveats there would be an opening, a reply and a closing; and while the danger of conflicting verdicts was avoided, neither of the parties interested was deprived of any right.
- 5th. That the order in which the evidence was to be offered would also be readily determined by the Court before which the issues were tried.

Worthington *vs.* Ridgely, Jr., *et al.*, Ex'rs.

APPEAL from the Orphans' Court of Baltimore County.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON and IRVING, J.

*A. W. Machen*, for the appellant.

*Fielder C. Slingluff*, for the appellee James L. Ridgely.

BRENT, J., delivered the opinion of the Court.

This is an appeal from the Orphans' Court of Baltimore County.

A paper, dated the 8th of January, 1879, purporting to be the last will of Noah Worthington of J., was exhibited in the Orphans' Court on the 5th day of February following by James L. Ridgely, Jr., one of the executors named in it, and proved in the usual form by the three subscribing witnesses.

On the 12th day of February Joshua F. C. Worthington, also named as one of the executors, filed a caveat and petition, alleging that said paper contained in fact the true last will of Noah Worthington, but that after its execution it was fraudulently altered, without the authority or knowledge of the testator, by the insertion therein of certain words of gift to James L. Ridgely, Jr., the effect of which was to make the instrument appear to bestow upon said Ridgely one-half of the whole residuary estate.

On the 18th of the same month Dye W. Worthington and Otis A. Worthington, two of the heirs at-law, file their petition and caveat to the entire paper exhibited, alleging that it was not executed in the manner and form required by law; that at the time it was executed Noah Worthington was not of sound and disposing mind; that it was the result of undue influence and undue importuni-



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*Worthington vs. Ridgely, Jr., et al., Ex'rs.*

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ties and that it was obtained and procured by misrepresentations, and by fraud and deceit.

On the fourth of March, James L. Ridgely, Jr., answered the petition and caveat of Joshua F. C. Worthington, and denied in very strong terms the allegation of a fraudulent alteration or interlineation of the paper in question. .

On the same day separate answers were also filed to the caveat of Dye and Otis Worthington, by Ridgely, Joshua F. Cockey, and Joshua F. C. Worthington, the three executors named in the alleged will. Ridgely insists upon the validity of the entire will; Cockey states that he knows nothing of the will except what is disclosed upon the face of it, and insists that the caveators, Dye and Otis Worthington, shall produce full proof of their allegations: and Worthington also insists upon its validity, except so far as it was fraudulently altered, as alleged in his caveat.

In the further progress of the case issues were prayed from the Orphans' Court to the Circuit Court for Baltimore County.

Joshua F. C. Worthington, upon his caveat, asked for four issues, as follows:

1st. Whether the tenth clause of the said paper-writing, dated the 8th day of January, 1879, and purporting to be the last will and testament of the said Noah Worthington, of John, at the time of the execution thereof by the said Noah Worthington, of John, and of the attestation and subscription thereof by the subscribing witnesses was in the words following:

"Tenth. All the rest and residue of my estate, real, personal and mixed, of which I may be possessed or may be entitled to at my decease, I give and bequeath to my nephew, Joshua F. C. Worthington," without the addition of any words limiting or materially qualifying the gift.

2nd. Whether the words "and my friend, James L. Ridgely, Jr., equally," in the tenth clause of the said

Worthington *vs.* Ridgely, Jr., *et al.*, Ex'rs.

paper-writing, dated the 8th of January, 1879, and purporting to be the last will and testament of Noah Worthington, of John, were inserted therein after the execution of said paper-writing, and without the authority and consent of the said Noah Worthington, of John?

3rd. Whether the said paper-writing, dated the 8th day of January, 1879, and purporting to be the last will and testament of Noah Worthington, of John, without the words "and my friend, James L. Ridgely, Jr., equally," in the tenth clause, was signed by the said Noah Worthington, of John, as and for his last will and testament in the presence of three credible witnesses, and attested and subscribed in his presence by the said witnesses?

4th. Was the said paper-writing, bearing date the 8th of January, 1879, and purporting to be the last will and testament of Noah Worthington, of John, without the words "and my friend, James L. Ridgely, Jr., equally," in the tenth clause thereof, and the execution thereof by him, his free and voluntary act, to which he was induced with a knowledge of the contents of the said paper-writing, and without the exercise of undue influence of some other person or persons upon him, which prevented him from acting according to his own free will?

Upon this caveat of Joshua F. C. Worthington the respondent, James L. Ridgely, Jr., also asked an issue as follows:

Whether the said James L. Ridgely, Jr., after the execution of the said will, mentioned in the proceedings, and while it was in his possession, and without the knowledge and consent of the said Noah, did fraudulently alter the same, by the insertion after the words "my nephew, Joshua F. C. Worthington," occurring on the twenty-eighth line of the second page, of the words "and my friend, James L. Ridgely, Jr., equally?"

On the caveat of Dye and Otis Worthington, six issues were prayed, substantially as follows:

*Worthington vs. Ridgely, Jr., et al., Ex'rs.*

1st. The due and legal execution of the paper.

2nd. Whether the testator was of sound and disposing mind?

3rd. Whether said paper was executed under the influence of suggestions, importunities or misrepresentations, when his mind, by reason of his diseased and enfeebled condition, was unable to resist them?

4th. Whether said paper was procured by undue influence?

5th. Whether it was procured by fraud, devices, deceits or misrepresentations?

6th. Whether said paper was the result of the free and voluntary act of the testator to which he was induced, with a knowledge of its contents, and without the exercise of undue influence upon him, which prevented him from acting according to his own free will?

There is no objection made either in the Orphans' Court or in this Court to the multiplication of the issues, and we shall not, therefore, advert to that question.

All the issues asked for were allowed by the Orphans' Court. They were grouped together in one case, with Joshua F. C. Worthington, and Dye W. Worthington and Otis A. Worthington, as caveators, and James L. Ridgely, Jr., and Joshua F. C. Worthington, James L. Ridgely, Jr., and Joshua F. Cockey, executors, as caveatees. And in that form the issues were directed to be sent for trial to the Circuit Court for Baltimore County.

On the part of the appellant, Joshua F. C. Worthington, it is insisted his caveat should be separated from that of the heirs-at-law, and two cases, instead of one, ordered to the Circuit Court for trial. This is resisted by James L. Ridgely, Jr., on whose behalf it is urged, that there is no error in the action of the Orphans' Court.

The case is certainly one of singular peculiarity, and we have had no little difficulty in reaching a satisfactory conclusion in regard to it.

Worthington vs. Ridgely, Jr., et al., Ex'rs.

We have referred at length to the issues asked for upon the two caveats, that they may be placed in juxtaposition, and it may thus be the more readily seen whether in the event of two separate cases being allowed the finding of the juries might not be different and directly in conflict.

The section of the Code, authorizing issues from the Orphans' Court, (*Art. 93, sec. 250*), is silent as to the course to be pursued by the Orphans' Court where two caveats involving different interests are filed to the same instrument or will. No case like the present has occurred in the judicature of this State, and we must be governed in our conclusions by the object and purpose proposed by this part of the testamentary system and the analogies of the law. *Pegg and others vs. Warford*, 4 Md., 393. The object of issues is, that the Orphans' Court may be instructed, upon the facts presented in them, by the finding of the jury. The facts thus found are finally established, and nothing is left for the Orphans' Court, when such finding is properly and duly certified to them, but to act upon them as conclusively settled in regard to the subject-matter in dispute, and to enter their judgment accordingly. It is, therefore, essentially proper that issues substantially involving the same questions should be so submitted that there can be but one finding and one verdict in regard to them. This can only be accomplished with certainty by submitting them to the finding of one jury, for if submitted to different juries it may be that their verdicts would differ, and the anomaly be presented of conflicting verdicts upon substantially the same issues. This question was considered in the case above referred to, and this Court there announced the rule to be, that "the same issue cannot be granted on the several applications of different parties, unless they be joined as plaintiffs or defendants, so as to produce at the trial but one and the same verdict." (4 Md., 394.)

Had the Orphans' Court, in sending up the issues asked for in this case, directed two cases instead of one, they

Worthington vs. Ridgely, Jr., *et al.*, Ex'rs.

would have acted in opposition to this rule; and different and conflicting verdicts, upon the third and fourth issues, (as we have cited them,) of Joshua F. C. Worthington, and upon the first, fourth, fifth and sixth issues of Dye and Otis Worthington, might have been the result.

This possible confusion is avoided by the course adopted by the Orphans' Court, and we think they acted rightly in bringing together the several issues asked for, in the *one* case, and in designating the caveators and caveatees, as they have done, in its titling. It would possibly have been more systematic, and tended somewhat to have simplified the proceedings before the jury, if in arranging the issues they had placed those asked for upon the caveat of Joshua F. C. Worthington together and in regular rotation. As they now stand, they are separated by those asked for upon the caveat of Dye and Otis Worthington. This arrangement, however, is but matter of form, and does not constitute error.

We cannot perceive how injustice can result to Joshua F. C. Worthington by trying the issues as they now stand. His position in the case can be readily explained to an ordinarily intelligent jury. The able Court, before which the case will be tried, will no doubt see that full opportunity is allowed him to do this, and with proper instructions granted to the jury there can be no confusion in their finding upon the several issues.

The difficulty suggested about the order of argument is more imaginary than real. Cases are constantly arising, especially in equity, where different interests are involved, and by analogy to them, the order of argument in this case will be determined. The caveator, Worthington, will be allowed to open upon his issues involving the alteration of the will, and the caveators, Dye and Otis Worthington, will also open upon their issues; Ridgely, the respondent to the caveat of Joshua, will reply, and also the counsel for the will; Joshua F. C. Worthington is then entitled

Mahoney vs. Mackubin, Trustee, et al.

to close on his issues, and Otis and Dye Worthington upon theirs. Thus upon both caveats there will be an opening, a reply and a closing, and while the danger of conflicting verdicts is avoided, neither of the parties interested is deprived of any right. The order in which the evidence is to be offered will also be readily determined by the Court before which the issues are tried.

It follows from these views that the order of the Orphans' Court appealed from will be affirmed.

*Order affirmed, and  
cause remanded.*

(Decided 15th July, 1879.)

ELLEN MAHONEY and JOHN C. MAHONEY vs. JAMES MACKUBIN, Trustee, and WILLIAM PARKS, Purchaser.

*Exceptions to Trustee's Sale—Acceptance of interest on mortgage debt after Default, no waiver by implication of the Default—Extension of time for payment—No such Extension effected by propositions held under advisement by the Mortgagee subject to conditions not complied with—A demand as a condition of Extension that taxes due but not collectable by distress, be paid, not an unreasonable one—Sufficiency of description of Property in Advertisement of Sale—Effect of weather upon Postponement of Sale—Inadequency of Price—Conduct of Trustee in making Sale.*

M. being trustee under a decree of the Circuit Court of Baltimore City, and as such trustee having funds in his hands for investment, invested the same under the direction of said Court in a mortgage on property in Baltimore County. A note was given for the principal of said loan, and separate notes for the semi-annual instalments of interest to accrue during the period for which the principal was loaned. The mortgage was conditioned for the payment of said

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*Mahoney vs. Mackubin, Trustee, et al.*

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notes, as they severally matured, and provided for a sale of the mortgaged property by the mortgagee as trustee, upon any default in the conditions of the mortgage. Just before the principal of the mortgage debt fell due, the mortgagor sold the mortgaged property to the wife of M., subject to said mortgage; and to secure an extension for another year, M. endorsed a written guaranty of the principal sum, (or balance thereof,) and the interest semi-annually, stating in said guaranty that it was for the purpose of securing an extension for one year from maturity. Further indulgence was given from time to time until the 11th of February, 1878, when the principal not having been paid, the trustee in March, 1878, advertised the property for sale, and sold the same pursuant to said notice, and reported the sale to the Court. On exceptions to said sale, it was HELD:

1st. That an acceptance by the trustee after the 11th of February, 1878, of the interest which fell due on that day could not by implication be held to extend the time for the payment of the principal.

2nd. That such extension was not effected by certain interviews between the trustee and M., not culminating in an agreement for extension.

In the first of said interviews the trustee demanded the payment of five thousand dollars of the principal to make the claim abundantly secure. Being importuned to withdraw that demand and indulge at least until the fall, he promised to see his *cestuis que trust*, and see what could be done, provided M. would at once go and have a certain policy of insurance assigned as collateral security, and would also pay the taxes unpaid and get receipt for the same deed, send him the written evidence of such payment and of such assignment by the following Monday morning. These demands were not complied with, and on the Monday morning, the trustee saw in the newspapers that M. had made an assignment for the benefit of his creditors, which fact had been concealed from him in the interviews referred to, notwithstanding the conveyance was made the day before the first interview. HELD:

1st. That the trustee was not only not bound by anything he had said to stay proceedings, but was fully justified in proceeding at once to advertise the property for sale.

2nd. That the fact that the taxes of which payment was required although due, could not have been collected by distress at that time, did not affect the right of the trustee to demand their payment, as one of the conditions of the extension.

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**Mahoney vs. Mackubin, Trustee, et al.**

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The mortgaged property consisted of three parcels, all of which were advertised as adjoining, and each was not only specially described by reference to Liber and page of the Land Records of Baltimore County, but the property was described as the former residence of Mr. A., a prominent citizen, and also as adjoining the famous H. estate of Mr. J. M., and as being one-and-a-half miles west of C. station on the N. C. Railroad in the limestone valley of the Beaver dams. **HELD:**

That the description was more than usually full, and sufficient to give notice to any one wishing to buy such property where it was, and enable him to find it for examination.

There had been rain in the morning but it was fair at the time of the sale. It cleared off before ten o'clock a. m. And the sale took place at one o'clock p. m. One of the witnesses stated that he had intended to go out and look at the property early that morning, but was prevented by the weather. It was not shown that he was wholly prevented from bidding by this fact, but that he was prevented by other considerations. **HELD:**

That taking all the proof together, the trustee did not appear to be reprehensible for not postponing the sale till another day.

Upon consideration of the facts touching the manner in which the sale was conducted, and the sufficiency of time allowed for the bidding, it was **HELD:**

That there was no objection to the sale in this respect.

It was also, upon a review of the testimony relating to the value of the property, and the price for which it was sold, **HELD:**

1st. That there was no ground for disturbing the sale upon the ground of inadequacy of price.

2nd. That there was nothing in the case to indicate any dereliction on the part of the trustee in regard to his duty to use his best efforts to effect a sale for the best possible price. And the price obtained for the property, which was very nearly the appraised value of it for the purpose of taxation, would not warrant the Court in attributing to him a failure to exercise reasonable discretion and reasonable endeavors to do justice by all his *cestuis qui trust*.

**APPEAL** from the Circuit Court for Baltimore County, in Equity.



Mahoney vs. Mackubin, Trustee, et al.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT. MILLER, ALVEY, and IRVING, J.

*Albert Ritchie*, for the appellants.

*James Mackubin*, for the trustee. .

*Bernard Carter*, for the purchaser.

IRVING, J., delivered the opinion of the Court.

From the record in this cause we learn that the appellee, James Mackubin, is a trustee, under a decree of the Circuit Court of Baltimore City, and as such trustee had funds in his hands for investment, which, under the direction of the Court, were loaned, to the extent of \$15,864.36, to John F. Shipley, who gave his note therefor, payable five years after date, with interest payable semi-annually, and for the interest gave notes maturing every six months during the term of the loan. To secure the principal and interest, according to the said terms of payment, the said Shipley executed a mortgage to the said James Mackubin, trustee, dated the eleventh day of February, 1870, on certain property in Baltimore County, conditioned for the payment of said interest notes as they fell due, and the principal, when it should become due, and upon any default, in any of the conditions of the mortgage, providing for a sale of the property by the said mortgagee as trustee. Just before the principal of said mortgage fell due, Shipley, the mortgagor, sold the property mortgaged to Ellen Mahoney, wife of John C. Mahoney, also one of the appellants, subject to the said mortgage, and to secure an extension for another year John C. Mahoney, husband of the grantee, endorsed a written guaranty of the payment of the principal sum, or balance thereof, (which was \$15,000.00,) and the interest semi-annually, stating in said

Mahoney vs. Mackubin, Trustee, et al.

guaranty that it was for "the purpose of securing extension for one year from maturity." Further indulgence was given from time to time, it appears, until the 11th of February, 1878, when the principal not having been paid, in March, 1878, the trustee advertised the property for sale, and afterwards, in pursuance of the notice, did sell on the 11th of April, 1878, and reported his sale to the Court. Exceptions to the ratification were filed, testimony was taken, and the Court having overruled the exceptions and ratified the sale and report, appeal has been taken to this Court.

The exceptions relied on in this Court for setting aside the sale are five in number. 1. Because there was no default to justify sale. 2. Because the property was insufficiently described. 3. Because the weather was not fit for sale to be made. 4. Because sale was improperly conducted. 5. Because the property sold for a grossly inadequate price. We will consider them in the order presented. First. According to the terms of the extension secured by the guaranty of John C. Mahoney on the 30th of January, 1875, the principal fell due on the 11th of February, 1876, and unless, by arrangement with the parties in interest, such extension was agreed upon as would have entitled the appellants to the aid of a Court of equity to enjoin the appellee, Mackubin, from making the sale when he did make it, the objection, that there was no default, cannot avail as against the sale made and reported. We can find no proof in the record establishing any such arrangement and creating any such equitable estoppel as is relied on by the appellants. In this inquiry it must be remembered that the appellee, Mackubin, occupied a two-fold fiduciary relation. As mortgagee he was the holder of funds invested, by the Court's order, in that mortgage, for the taking of which he was the Court's agent, and held the same as trustee for others whose interests he could not compromise legitimately, without the assent of the *cestuis que trust*, or of the Court. As

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Mahoney vs. Mackubin, Trustee, et al.

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trustee, for the sale of the property appointed by the mortgage, his only duty was to execute the trust as to the sale with fidelity to both mortgagor and the *cestuis que trust* of the fund secured by the mortgage.

The only evidence from which an agreement to extend the time for payment of principal, is sought to be deduced, is the fact that the interest which fell due on the 11th of February, 1878, was received after it had been past due some days, and that there were some interviews between Mr. Mackubin and John C. Mahoney, one of the appellants, respecting such extension. The interest was due on the 11th of February, 1878, and the note for it went to protest but was afterwards paid. It is too clear for argument that the acceptance of what was due for interest cannot, by implication, be held to extend the time for the payment of the principal. The interviews between Mr. Mackubin and Mr. Mahoney did not culminate in agreement for extension, and no express agreement is insisted upon; but it is urged that what was said in those conversations by Mr. Mackubin amounted to a waiver of the default made. We do not so read the proof. In the first interview Mr. Mackubin demanded the payment of five thousand dollars of the principal, to make the claim abundantly secure, of which, by reason of the great shrinkage in real estate values, he had grown distrustful. Being importuned to withdraw that demand and indulge at least until the fall. Mr. Mackubin promised to see his *cestuis que trust* and see what could be done, provided Mr. Mahoney would at once go and have a certain policy of insurance assigned as collateral security, and would also pay the taxes unpaid, and get receipts for the same and send him the written evidence of such payment and such assignment, by the following Monday morning. In the subsequent interviews these demands were not withdrawn. Mr. Mahoney admits these demands and that they were not complied with by the time named by Mr. Mackubin; but he says that after having these talks he "rested easy."

Mahoney vs. Mackubin, Trustee, et al.

We do not think he was warranted in making himself easy, in view of these talks, without complying with the requirements of Mr. Mackubin, which were conditions precedent even to his seeing his *cestuis que trust*, the Gaithers, on the subject, to see if on those terms they would consent to the extension. He could not fail to understand from what was said that Mr. Mackubin did not feel warranted to give an extension of the time, without the consent of the Gaithers, the beneficiaries of the fund, and therefore he could not reasonably understand the default to be waived. Receiving no receipts for taxes, and no evidence of the assignment of the policy of insurance on Monday as he required; and seeing, as he did, in the newspapers on Monday, that Mr. Mahoney had made an assignment for the benefit of his creditors, which fact had been concealed from him in the interviews referred to, notwithstanding the conveyance was made the day before the first interview; and inasmuch as such assignment cast discredit upon the value of Mahoney's guaranty, upon the faith of which previous extension had been granted, and diminished his security, or at least put the guaranty in jeopardy, we think Mr. Mackubin was not only not bound by anything he had said, to stay proceedings, but was fully justified in proceeding at once to advertise the property. Fidelity to his trusts and the beneficiaries under them required him to take steps which would make all his securities available. Whether he would be entitled to anything from Mahoney's trustee could not be ascertained till the mortgaged premises were sold, and it was known whether a balance would be left for his estate to meet by reason of his guaranty.

The view we take of the matter makes it immaterial whether the taxes which were required to be paid were technically demandable or not, about which the counsel for appellants have argued so ably, that as they could not be collected by distress at that time, they were not techni-

*Mahoney vs. Mackubin, Trustee, et al.*

cally due. They were said to be due, and though they might not be collected by distraint, they soon would be, and to prevent that being done may have been one of the reasons for requiring their payment, before proposals for extension would be entertained. Whether collectable by compulsion at that time made no difference, payment by a particular day was demanded and was not made.

2. The objection as to insufficiency of description of the property in the advertisements is equally untenable. The property consisted of three parcels, all of which were advertised as adjoining, and each not only specially described by reference to Liber and page of the land records of Baltimore County, but the property was described as the former residence of Mr. Albert, a prominent citizen, and also as adjoining the famous "Hayfields estate" of Mr. John Merryman, and as being one and a half miles west of Cockeysville station on the Northern Central Railroad, in the limestone valley of the Beaver dams. The description seems to us more than usually full, and is certainly sufficiently so to give notice to any one wishing to buy such property, where it was, and enable him to find it for examination.

3. The objection on the score of weather is also without foundation, as a reason for disturbing the sale. All agree that there had been rain in the morning, and all agree it was fair at the time of sale. The sale took place about one o'clock, p. m., and Mr. O'Ferral, exceptants' witness, says it cleared off before 10 o'clock. He had intended to go out and look at the property early that morning, but was prevented by the weather and did not go out till 12 o'clock. He had had full opportunity of going before, and if he did not, it was his own fault. The objection would be more plausible if he was shown to have been wholly prevented from bidding by this fact; but it appears that he was prevented by other considerations. Taking all the proof together we cannot see that the trustee is reprehensible for not postponing the sale till another day.

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*Mahoney vs. Mackubin, Trustee, et al.*

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4. The only objection to the mode of conducting the sale is, that sufficient time was not given for the bidders to bid; that it was too much hurried up, and the property was struck off too quickly. It is unnecessary to analyze the testimony on this point, as we do not think the proof justifies any interference with the sale on that ground. None of the persons who participated in the bidding, or seem to have had any idea of bidding, regarded the action of the auctioneer as premature, or the suggestions of the trustee as calculated to injure the sale; and unless there was good ground to so suppose, the Court was right in overruling this objection also.

5. The last objection is, that the price obtained was wholly inadequate. It is very clear, that the property has not brought as much money as it did bring a few years before, and as other property of like character had brought in the neighborhood some years before. But it is also proved, that great depreciation in property values, and especially of real estate, had taken place after appellant's purchase, so as to make it difficult to put a safe estimate on the real value of this property. A large real estate owner, in the immediate vicinity of this property, had advised Mr. Mackubin to require a reduction of the debt to make sure of his security being adequate; and the same person, although he was a man of abundant means, did not think there was prospect of enough speculation to join the purchaser in the purchase. The testimony as to the value of the property, in excess of what it has brought under the hammer, is purely speculative, and is not sustained by the comparative prices brought by other property lately before sold in that region. It may be the property is worth more money, even on a cash sale as this is, and that Mrs. Mahoney is a great sufferer by her purchase, subject to this mortgage, is abundantly clear; but we do not see, in this sale, which is very nearly for the appraised value of the property, for the purpose of taxation, good

*Mahoney vs. Mackubin, Trustee, et al.*

ground to disturb it. This Court has repeatedly decided that mere inadequacy of price is not sufficient to set aside a sale. It may be evidence of fraud or misconduct on the part of the trustee, and in connection with other evidence may be regarded as a reason for setting aside a sale. *Glenn vs. Clapp*, 11 *G. & J.*, 1, and *Hubbard and Wife vs. Jarrell*, 23 *Md.*, 83; *Cohen vs. Wagner*, 9 *Gill*, 236; *Johnson vs. Dorsey*, 7 *Gill*, 269.

Every trust deed is upon the condition implied, that the trustee will obtain the best price possible, and will make reasonable efforts to do so; and that he will act with reasonable judgment and discretion. We have seen nothing in the case to indicate any dereliction on the part of the trustee in this regard, and certainly the price obtained will not warrant us in attributing to him a failure to exercise reasonable discretion, and reasonable endeavors to do justice by all his *cestuis que trust*. It is worthy of notice, that the mortgagee nor the *cestuis que trust* of the fund in this case were the purchasers of the property, as was the case in the case of *Hubbard and Wife vs. Jarrell*, 23 *Md.*, 66, and *Horseys vs. Hough*, 38 *Md.*, 130, cited by appellants' counsel. In those cases the Court said that fact subjects them to a stricter construction of the rules, and makes the inadequacy of price a weightier reason for interfering in behalf of the mortgagor. Here a wholly disinterested party is the purchaser, who has paid his money, and is also in Court defending his purchase. His bid was fairly made, in open market, where the trustee had brought the property, with the exercise of proper discretion, and after proper notice, under the hammer, and there seems to be no sufficient reason for depriving him of his purchase, or subjecting him to a new competition. The property may have enhanced in value since the sale, and if so, he is entitled to that benefit, unless he is responsible, in some way, for the failure of the former sale to bring a proper price, or there was some misconduct, in or about the same, of the

Mahoney vs. Mackubin, Trustee, et al.

trustee which makes it unfair to ratify it. This Court in the case of *Johnson vs. Dorsey*, 7 Gill, 287, adopt the language of the Vice-Chancellor in *Woodhull vs. Osborne*, 2 Edwards' Rep., 616, and say, that, "where a stranger or third person becomes the purchaser in good faith, something more than a mere offer of a higher price must appear to induce a re-sale, such as fraud or misconduct of the master or other person, having control of the sale, or surprise on the party interested, or his having been mislead as to the time and place of sale; and when circumstances of the latter description are relied on the party must show they proceeded from, or were caused by the purchaser, or some person connected with or having the management of the sale." In the case of *Johnson vs. Dorsey* the Court reversed an order setting aside a sale where it was alleged the property had brought very little over half price, for the reason just quoted amongst others. None of the circumstances enumerated by the Vice-Chancellor in the case just cited are found here. No misconduct on the part of the trustee has been established, and none on the part of the purchaser has been alleged. There is no proof that any one was prepared to make a larger cash offer. One witness has said he was authorized to offer a trade, in which the property was to be estimated higher, but whether the property offered in exchange would have netted more money is wholly uncertain and speculative. The opinions of witnesses vary somewhat, as to the real value of the property, but those opinions are mere speculations, and there is no sufficient warrant from the evidence to expect, with any certainty, a larger price, if we were otherwise justified in ordering a new sale. Fully concurring with the Circuit Court in regarding the exceptions insufficient to avoid the sale, we shall affirm the order appealed from.

*Order affirmed with costs,  
and cause remanded.*

(Decided 15th July, 1879.)



## SMITH RAYNER vs. THE STATE OF MARYLAND.

*Question whether a Writ of Error will lie to Review the judgment of a Justice of the peace Affirmed on appeal to the Circuit Court, where the Circuit Court has acted in the exercise of a Special jurisdiction—Effect of a judgment of the Circuit Court rendered within the limits of a Special jurisdiction—Right of the party in such case to an Appeal or Writ of Error, if he had applied for a Writ of Certiorari, upon the specified ground of the Unconstitutionality of the Statute conferring the jurisdiction—Effect of the Statute giving an appeal to the Circuit Court from the judgment of a magistrate, upon the right of the party to a writ of Certiorari for the purpose of testing the Validity of the statute.*

The plaintiff in error was charged before a justice of the peace with a violation of the provisions of the Act of 1872, ch. 198, and the amendments thereto contained in the Act of 1878, ch. 502. The statute by express terms gave the right of appeal from the judgment of the justice to the Circuit Court, without giving any right of appeal to the Court of Appeals. The judgment of the justice being against the plaintiff in error, whereby he was fined and his boat and nets confiscated, he took an appeal to the Circuit Court, and gave bond to prosecute that appeal with effect or to abide a judgment of affirmance. On a writ of error it was HELD:

- 1st. That having invoked that jurisdiction, and submitted himself to it, and the case having been regularly tried, he had no redress by an appeal or writ of error to this Court.
- 2nd. That although the Circuit Court in hearing and adjudicating upon the appeal, was not in the exercise of its ordinary common law jurisdiction, but was acting as a Court of special jurisdiction, bound to observe and conform to the provisions of the statute, its judgment rendered within the limits of the special jurisdiction conferred, was not only binding but final, and this Court has no power to review it.
- 3rd. That if, instead of the appeal under the statute the party had applied for the writ of *certiorari* upon the specified ground of the

Rayner *vs.* State.

unconstitutionality of the statute, and the consequent want of power and jurisdiction of the magistrate to proceed under it, the Circuit Court would then have been in the exercise of its ordinary common law jurisdiction, and from its judgment in the premises a writ of error or an appeal could have been prosecuted to this Court.

4th. That the fact that the statute gives an appeal to the Circuit Court from the judgment of the magistrate, does not take away or deprive the party of the benefit of a *certiorari* for the purpose of having decided the question of the power and jurisdiction of the magistrate, though the writ will not be granted to bring up the case on its merits as distinguished from the question of jurisdiction where an appeal is given.

WRIT OF ERROR from the Circuit Court for Charles County.

The plaintiff in error was charged before a justice of the peace of Charles County, on the oath of William S. Chiles, Deputy Commander of the Fishery Force, with a violation of the provisions of the Act of 1872, ch. 198, and the amendments thereto passed at January session, 1878, ch. 502, by fishing a trap or net of less than three inches mesh, and without having any license, near the mouth of Port Tobacco creek, a tributary of the Potomac River, between Maryland Point in Charles County and Chiseldine Island in St. Mary's County; said trap or net being so placed as to obstruct the passage of fish to the head waters of said Port Tobacco Creek, and said appellant not being a *bona fide* citizen of Charles County.

At the trial before the justice the plaintiff in error was found guilty and fined, and his boat and nets were confiscated. On appeal the judgment was affirmed by the Circuit Court, whereupon the party convicted applied for a writ of error.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

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Rayner vs. State.

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*Frank H. Stockett*, for the plaintiff in error.

The justice of the peace, and consequently the Circuit Court, sitting as an Appellate Court, had no jurisdiction in the case, because the Acts of 1872, chap. 198, and 1878, chap. 502, under which these proceedings were conducted, are unconstitutional, inoperative and void, for the following reasons:

The first section of Act of 1872, chap. 198, as amended by 1878, chap. 502, is clearly unconstitutional, because it restricts the right of fishery in a part of the Potomac river to a very small minority of the people of the State, and deprives the very large majority of that right. The right of fishing in the waters of the State belongs to the whole people, and cannot be made the exclusive privilege of a few. 3 *Kent Com.*, 418; *Browne vs. Kennedy*, 5 *H. & J.*, 195; *Phipps vs. State*, 22 *Md.*, 380; *Martin vs. Waddell*, 16 *Peters*, 368, 410-12; *Arnold vs. Mundy*, 1 *Halsted*, 1; *Weston vs. Sampson*, 8 *Cush.*, 347.

The 2nd section of the Act of 1872, as amended by 1878, chap. 502, and also the 2nd section of the Act of 1878, are inoperative, because the State of Virginia has never assented to said Acts or passed any similar laws, and the burden of proof is upon the State. *State vs. Hoofman*, 9 *Md.*, 28; *Compact of 1785, chap. 1*, (2 *Kilty's Laws*.)

The 4th section of the Act of 1878, is somewhat confused in its phraseology. It is an additional section added to the Act of 1872, and to make it intelligible when taken in connection with the first section of the Act, it must mean that the *bona fide* citizens of Charles County are prohibited from fishing with a trap or pound net near enough to the mouth of the tributaries to prevent the free passage of the fish.

This section, to make sense, must be read and construed with the first section, and is inseparably connected with it. It prohibits *all persons* from fishing the trap or pound net near the *mouth of the tributaries*, and then makes an

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Rayner vs. State.

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exception in favor of citizens of Charles County. This section is liable to the same objection to which the first section is liable. If the right of fishing in the public navigable waters of the State resides in the people at large, and no exclusive monopoly of this right can be granted to a few, certainly the *mode* of exercising this common right of fishery must be equally the common right of the whole people of the State. It would hardly do to say that the citizens of Charles should fish with trap or pound nets, while the rest of the State were restricted to hook and line. This section applies to trap or pound nets, *without* as well as *within* the tributaries of the Potomac, and for those *without* the mouths of *the* tributaries and on the Potomac, the same objection exists that does to the second section, to wit, the State of Virginia has not assented to the Act or passed any similar law.

By the ninth section of the original Act, the *attempt* to violate the provisions of that law is made a misdemeanor. By necessary implication the consummated act must necessarily be a misdemeanor also. The attempt must *precede* the wilful act. The word *attempt* means to try to undertake. No one ever did or will fish in the Potomac with trap or pound net who did not try to do it. Any one, therefore, who does violate the provisions of this law has attempted it, and is therefore guilty of a misdemeanor.

A misdemeanor is a crime. In fact they are synonymous terms. 4 *Black. Comm.*, 4, 5.

And the person guilty of a misdemeanor is guilty of a crime. A prosecution under this Act is therefore a criminal prosecution, and the accused is entitled to claim the benefit of the 21st section of the Bill of Rights. *Ford vs. State*, 12 *Md.*, 514, 549; *Grove vs. Todd*, 41 *Md.*, 641.

It is true that by the Act the accused has the right to appeal to the Circuit Court from the judgment of the justice of the peace, and on such appeal he has the right of trial by jury, but he is only given the right of a jury trial

Rayner *vs.* State.

on his *second trial* and *not on his first*; but the 21st section of the Bill of Rights, secures to the accused a jury *on his first trial*, and any Act of Assembly that attempts to take away that right is void. The Bill of Rights only contemplates *one trial*.

In the case of *State vs. Mister*, 5 *Md.*, 11, no question was raised as to the constitutionality of the law, but that case, as well as the case of *State vs. Mace*, 5 *Md.*, 337, recognizes the law to be that if the Circuit Court had no authority by law to revise the decision of the justice, an appeal would lie to this Court. See also — *Cole vs. Hynes*, 46 *Md.*, 181; *Herzberg vs. Adams*, 39 *Md.*, 309.

Now, an unconstitutional or inoperative Act of Assembly is no *law at all*. It can give no right of appeal to the Circuit Court, and the Circuit Court cannot rightfully entertain such an appeal, and its judgment on such an appeal being unwarranted by law, is subject to revision in this Court.

*Charles J. M. Gwinn*, Attorney-General, for the defendant in error.

The Acts of 1872, ch. 198, and 1878, ch. 502, are not unconstitutional, inoperative or void. They do not deprive a person, charged with violating any of their provisions, of the right to a jury trial. It is expressly provided by the 6th section of the Act of 1872, ch. 198, that, in all cases arising under the Act, there might be an appeal to the Circuit Court for Charles County, subject to the law governing other cases of appeals from the determinations of justices of the peace; and under section 50 of Article 5 of the Code of Public General Laws, the appellant had a right to appeal to the Circuit Court for Charles County, and in such Court might have obtained, if he had seen proper to do so, the benefit of a jury trial.

It was not necessary that the appellant should have been arrested upon a warrant issued by a justice of the

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Rayner vs. State.

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peace of Charles County, because the 5th section of the Act of 1872, ch. 198, authorized the arrest of a person offending against the provisions of the Act *without a warrant*. He could have been arrested without a warrant, when found committing the offence, even if the Act of 1872, chap. 198, had made no such provision. *Derecourt vs. Carbisley*, 5 *Ellis & Black*, 188, (85 *E. C. L. Rep.*, 192.)

When the offender was arrested and brought before the justice of the peace, the case was triable before such justice, upon the information upon oath given to such justice. *Act of 1872, ch. 198, sec. 4.*

The appellant could have obtained, if he had so pleased, a copy of the information upon which the proceedings in the case were grounded. The record does not show that he made application for a copy of such paper, and that it was refused to him. The record, therefore, does not show any infringement of the rights secured to the appellee by the 21st Article of the Bill of Rights.

The appellant did not demand a trial by jury, but submitted to a trial before the Circuit Court for Charles County, upon his appeal to that Court. He therefore waived his right to trial by jury, and submitted his case to the Court.

It appears by the judgment of the Circuit Court for Charles County, given in this case, that the particular locality in which the offence charged was committed, was Port Tobacco creek, one of the tributaries of the Potomac river, between the points named in section 1 of the Act of 1878, chapter 502, and within the limits of Charles County.

As it is alleged in the affidavit, on which the plaintiff in error was held for trial, that he was not a citizen of Charles County, and as it is not shown in the record that he was a citizen of any other county or municipal division of this State, or of Virginia; and as the offence appears

Rayner vs. State.

to have been committed within the limits of Charles County, neither the jurisdiction of the justice, nor the jurisdiction or judgment of the Circuit Court for Charles County can be impeached. It must be intended, if need be, that the appellee was not a citizen of Virginia or of Maryland, and that the justice and Circuit Court for Charles County had respectively jurisdiction of the offence; for it clearly appears, from the tenth Article of the compact between Maryland and Virginia, (*Md. Act*, 1785, ch. 1; *Code of Virginia*, 1873, pages 110, 111,) that offences committed within the limits of any Maryland County, or committed upon the Potomac river, by persons not citizens of either State, were triable in the county into which such offenders were first brought.

The State of Maryland is the owner of all the beds of all tide-waters within its jurisdiction, except to the extent to which it has seen proper to alienate such ownership. *McCready vs. Virginia*, 94 *U. S.*, 394. It had the power, as such owner, to appropriate such tide-waters and their beds to the common benefit of its whole people, or to grant the exclusive use of part of this property to certain of its citizens only. 94 *U. S.*, 396.

ALVEY, J., delivered the opinion of the Court.

The first question to be determined is, whether this case is properly before us. The statute under which the proceeding originated before the justice of the peace gave the right of appeal to the Circuit Court for Charles County (Act of 1872, ch. 198, sec. 6,) and from the judgment of the latter no appeal or writ of error will lie to this Court, unless expressly given by statute. It is only where the Circuit Court has proceeded without right or jurisdiction to hear and decide the case that an appeal or writ of error may be taken to this Court to reverse the judgment thus unwarrantably rendered. But here the statute, under which the proceedings were taken, by express

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Rayner vs. State.

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terms, gave the right of appeal from the judgment of the justice to the Circuit Court, without giving any right of appeal to this Court. The judgment of the justice being against the present plaintiff in error, whereby he was fined and his boat and nets were confiscated, he took the appeal to the Circuit Court, and gave bond to prosecute that appeal with effect, or to abide the judgment of affirmance. Having invoked that jurisdiction and submitted himself to it, and the case having been regularly tried, he has no redress by an appeal or writ of error to this Court. If the Circuit Court had power and jurisdiction, under the appeal taken, to revise and reverse the judgment of the justice, either for the want of jurisdiction in the justice or upon other grounds, it had right and jurisdiction to affirm the judgment of the justice, and that judgment of affirmance must be taken as final and conclusive, as the judgment of reversal would have been, if such judgment had been rendered. There is no pretence but that the case was properly before the Circuit Court on the appeal, and that it was regularly tried; but it is insisted that the statutes under which the proceedings were taken are, in several of their provisions, unconstitutional and void, and therefore there was no jurisdiction either of the justice or the Circuit Court to try and decide the case. But, whatever may be thought of the particular provisions of the statute supposed to be obnoxious to constitutional objections, and if the objections were conceded to be well taken, it does not follow that the right of appeal was not well and validly given, and that the Circuit Court would not have power and jurisdiction to hear and decide the case. It is true, the Circuit Court in hearing and adjudicating upon the appeal was not in the exercise of its ordinary common law jurisdiction, but was acting as a Court of special limited jurisdiction, bound to observe and conform to the provisions of the statute, if, in its judgment, the statute was valid. Its judgment, however, rendered within



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Rayner vs. State.

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the limits of the special jurisdiction conferred, is not only binding, but is final. This Court has no power to review it, and consequently the assignment of errors must be dismissed. The cases of the *State vs. Mister*, 5 *Md.*, 11, and *State vs. Bogue*, 5 *Md.*, 352, following the previous cases of *Wilm. & Susq. R. Co. vs. Condon*, 8 *Gill & J.*, 443, and *Webster vs. Cockey*, 9 *Gill*, 92, are in all respects conclusive of this. See also *Hough vs. Kelsey & Gray*, 19 *Md.*, 451.

If the judgment of the Court below had been rendered without power or jurisdiction to hear and decide the case: for instance, if the appeal had not been authorized by law, or if judgment had been rendered against the party in his absence and without legal notice, or opportunity of defending himself or asserting his rights, or the Court had, in the rendition of its judgment, transcended the limited jurisdiction conferred upon it; in all such cases the party prejudiced by the judgment would have had the right of appeal. In other words, there would have been a want of jurisdiction in the Circuit Court to render the judgment, and for that reason the right of review would exist. But all these instances, where the right of appeal has been sustained, are clearly distinguishable from the present case, where no such defect of jurisdiction exists.

It has been urged that, as the rights of personal liberty and of private property are involved, it would be a strange defect of the law, and a great hardship, if the party be denied the right of resorting to this Court to have the question of the constitutionality of the statute, under which it is supposed his rights have been unjustifiably invaded, finally decided. But, though the party may be denied the right of such resort in the mode and under the circumstances of this case, it does not follow that the law denies to a party feeling himself aggrieved the means of reaching this Court, on such a question, by the proper proceeding. If, instead of the appeal under the statute,

the party had applied for the writ of *certiorari*, upon the specific ground of the unconstitutionality of the statute, and the consequent want of power and jurisdiction of the magistrate to proceed under it, the Circuit Court then would have been in the exercise, not of the special limited jurisdiction, but of its ordinary common law jurisdiction; and from its judgment in the premises a writ of error or an appeal could have been prosecuted to this Court. *Hall vs. The State*, 12 Gill & J., 329; *Swann vs. Mayor, &c., of Cumberland*, 8 Gill, 150, 155. And the fact that the statute gives an appeal to the Circuit Court from the judgment of the magistrate does not take away or deprive the party of the benefit of a *certiorari* for the purpose of having decided the question of the power and jurisdiction of the magistrate, though the writ will not be granted to bring up the case on its merits, as distinguished from the question of jurisdiction, where an appeal is given. 2 *Bac. Abr.*, tit. *Certiorari*, 165, 177; *Rex vs. Morley*, 2 Burr., 1040, 1042; *Rex vs. Whitbread*, 2 Doug., 549; *Rex vs. Abbott*, *ib.*, 553; *Rex vs. Jukes*, 8 T. Rep., 542, 544.

As we have already said, the case not being properly before this Court, the assignment of errors, made under Rule 1, respecting the right of appeal, (29 Md., 1,) must be dismissed.

*Dismissed accordingly.*

(Decided 15th July, 1879.)

MARY J. JOHNSON vs. SAMUEL HAMBLETON, Trustee,  
and others.

*Sale of Mortgaged property in Solido—Junior lien-holders—  
Junior lien-holders properly made Parties to a Bill by the  
Senior lien-holders to procure a Sale of Mortgaged property—  
Equity practice—Duty of Court to protect the interest of the  
Junior lien-holders.*

A bill was filed by the senior mortgagee for a sale of the mortgaged property, to pay his claim, and all the junior lien-holders, together with the mortgagor, and the grantee of the land subject to the mortgages thereon, were made parties defendants, and all, except the mortgagor and his grantee came in and answered, admitting the allegations of the bill and submitting to a decree, and against the mortgagor and his grantee an interlocutory decree was had; a trustee was appointed to make sale of the mortgaged premises, and authorized to sell so much thereof as might be necessary for the purposes, and on payment of the entire purchase money, to convey the property sold, clear and discharged of all claim of the parties to the suit. The trustee sold the entire mortgaged property *in solido*, save two acres, which was sold separately. The proceeds of sale were more than sufficient to pay the claim of the complainant. It did not appear that a more advantageous sale would have been effected by selling the land in parcels. On exceptions by the grantee of the mortgagor to the ratification of the sale on the grounds that the decree did not authorize a sale of more land than was enough to pay the complainant's claim and costs, and that the land was divisible into parts and the trustee should have divided and sold it in parcels, the exceptions were overruled and the sale was sustained.

Where on a bill filed by the senior mortgagee for a sale of the mortgaged premises, to obtain payment of his claim, the junior lien-holders who were made parties defendants, came in and answered, admitting the allegations of the bill, which alleged their claims to be unpaid, and consenting to a decree, such admission and consent must be regarded as a submission of their rights to the protection

Johnson vs. Hambleton, Trustee, et al.

of the Court, though they did not formally pray payment of their mortgages.

Where a bill is filed by the senior mortgagee for the sale of the mortgaged premises, to secure the payment of his claim, it is proper to make the junior lien-holders parties to the suit, with a view to a final settlement of the rights of all the parties in interest. And when they are thus made parties, they are concluded by the decree.

Where a decree is passed for the sale of mortgaged property on a bill filed by the senior mortgagee to secure the payment of his claim, the junior lien-holders having been made defendants, and having answered, admitting the allegations of the bill, and consenting to a decree, such decree, as being the better practice, should refer specially to the junior lien-holders, defendants, and provide in so many words for the payment of their claims out of the surplus proceeds of sale. But the omission to do so should not be held to prejudice their rights.

The equities of such junior lien-holders are as much before the Court and as much entitled to its protection as the complainant who is the holder of the first mortgage; and the Court will not lose sight of their interest when they are in Court assenting to the sale and relying on the Court for protection.

This case distinguished from the cases of *Boteler & Belt vs. Brookes*, 7 *Gill & John.*, 143, and *Hubbard and Wife vs. Jarrell, et al.*, 23 *Md.*, 66.

APPEAL from the Circuit Court for Talbot County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY and IRVING, J.

*Wm. Shepard Bryan*, for the appellant.

*John H. Handy*, for the appellees.

IRVING, J., delivered the opinion of the Court.

This cause comes up on the appeal of Mary J. Johnson, from the decision of the Circuit Court for Talbot County,

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*Johnson vs. Hambleton, Trustee, et al.*

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ratifying and confirming the sale and report of Samuel Hambleton, trustee, under a decree of said Court passed in a cause, wherein Thomas Ridgaway is complainant, and the appellant and others are defendants. A proper understanding of the questions raised by the exceptions to the sale, and before us for review, requires a brief recital of the facts of the case. On the 26th day of June, 1866, Robert D. Johnson executed a mortgage to Thomas Ridgaway, of the city of Philadelphia, on certain land in Talbot County, to secure the payment of twenty-two hundred dollars. On the 27th day of June, 1866, the said Robert D. Johnson made another mortgage to one Margaretta M. Flanagin, wife of James S. Flanagin, to secure the payment of a bond of eight thousand dollars, which was conditioned for the payment of four thousand dollars; which bond and mortgage were assigned to the Easton National Bank, as collateral security for a note of James S. Flanagin and others, for seven thousand dollars. Sundry other mortgages were executed, bearing date either same day as the Flanagin mortgage, or subsequent thereto: and finally the said Robert D. Johnson, in 1875, conveyed his ultimate equity of redemption to the appellant, Mary J. Johnson. The mortgage to Ridgaway, which was the senior lien, falling due, he filed his bill in said Court for sale to pay his claim, and all the junior lien-holders were made parties defendants, and so also were Robert D. Johnson, the mortgagor, and Mary J. Johnson, the grantee of the land subject to the said mortgages. The Easton National Bank was made a party, as assignee of the Flanagin mortgage. All these parties, defendants, were duly brought into Court, and all answered admitting the facts of the bill and liens set out, except Robert D. Johnson and Mary J. Johnson, and against them an interlocutory decree was passed. Testimony was regularly taken and the case went to final decree, and Samuel Hambleton was appointed trustee to make sale of the mortgaged

Johnson *vs.* Hambleton, Trustee, *et al.*

property. The mortgage debt ascertained by the decree, was not paid, and the trustee made sale and reported his sale to the Court. It was ratified *nisi*; and on exceptions being filed to the final ratification, proof was taken; and on hearing the Court overruled the exceptions, and ratified the sale, and from that order of the Court this appeal was taken.

Some of the exceptions in the record do not appear to have been relied on at the hearing below, and certainly have not been pressed in this Court, so that our attention will be confined to those exceptions which have been presented to and relied on in this Court. Properly considered they may be resolved into two exceptions, which we will examine. First, it is contended that the decree did not authorize a sale of more than enough land to pay the complainant's mortgage claim and costs; that the land was divisible into parts, and the trustee should have divided it, and sold in parcels; and that the appellant's interests, as the grantee of the land, have been prejudiced by the trustee's neglect to so divide and sell it.

This exception is based on the language of the decree, and on the decision of this Court in the case of *Boteler and Belt vs. Brookes*, 7 Gill & Johnson, 143. The decree provides as follows, "that unless the defendants shall on or before the 23rd day of February next, pay to the complainant, or bring into this Court to be paid, the sum of two thousand and two hundred dollars, with interest thereon from the twenty-sixth day of June, 1875, together with the costs of suit, to be taxed by the Clerk of this Court, the mortgaged premises in the proceedings mentioned, or so much thereof as may be necessary for the purposes, be sold." It is urged that the language "so much thereof as may be necessary" is restrictive so as to limit a sale to so much as was needed to pay the claim on which suit was instituted; and that, although all the junior lienholders are made parties, and all their claims were over-

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*Johnson vs. Hambleton, Trustee, et al.*

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due and unpaid, and the decree directs the sale to be made, "clear and discharged of all claim," they may have on the property, inasmuch as they have not made their answers in the nature of cross-bills, and the decree has made no special provision for their payment, the trustee could only sell enough to pay that claim and no more, and therefore the sale of the whole which has been made by the trustee ought to be set aside and another sale ordered. The answers of the parties are noted in the record as having been filed, but they are not set out in full, so that we do not know in what precise form they have admitted the allegations of the bill and assented to a decree. But if they did not formally pray payment of their mortgages respectively, the admission of the allegations of the bill, which alleged their claims as unpaid, and submission to a decree could not be regarded as other than a submission of their rights to the protection of the Court. That the junior lien-holders were proper parties to the suit cannot be questioned in the light of the numerous decisions of this Court on that subject. At the last term of this Court, in the case of *B. G. Harris, et al. vs. William E. Hooper, et al.*, 50 Md., 547, the authorities are all reviewed and collated, and the Court says "it is generally proper to make them parties, with a view to a *final settlement* of the rights of all the parties in interest." The reason assigned is that there may be an end of suits or to prevent a multiplicity of suits. All authorities agree that when they are made parties they are concluded by the decree. By the very terms of this decree their interests are directed to be sold, and if their right to redeem is cut off by the sale, equity requires that their rights shall be protected in the distribution of the proceeds of sale. As junior mortgagees they have no interest save in the equity of redemption, which is sold under the decree, and is represented by the surplus proceeds of sale, after paying the first incumbrancer, who, in this case, is the complainant. The better

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Johnson *vs.* Hambleton, Trustee, *et al.*

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practice would undoubtedly be, to refer especially in the decree to the junior lien-holding defendants, and to provide, in so many words, for their payment out of the surplus proceeds of sale. But the omission to do so ought not to be held as prejudicing their rights. Assuming the whole property necessarily sold because of indivisibility, when all the claims were before the Court, and their holders parties defendants, it could hardly be regarded as necessary for special petitions to be filed, after sale, to entitle the junior lien-holding defendants to a distribution of the surplus. The equities of all such parties are as much before the Court and as much entitled to its protection, as the complainant who is the holder of the first mortgage; and the Court will not lose sight of their interests when they are in Court, assenting to the sale and relying on the Court for protection. In such case the Court will not pass an order securing the satisfaction of the complainant's mortgage only, without any regard to its effect on the rights of those who are juniors in date. Jones, in his excellent work on mortgages, says, in section 1616, "in any case where it is necessary to sell the whole property for the protection of subsequent incumbrancers, the sale will be sustained." The counsel for the appellant admits that under proper pleadings a sale for the benefit of all might have been ordered, but insists that the sale as ordered does not justify the sale as made, nor save the other mortgage defendants from the necessity of further proceedings. We might well rest our view of that position on the well recognized principle that the Court will ratify when done that which it would have ordered to be done, in and through the pending proceeding. If for the reason assigned the Court had set aside the sale, could not the other mortgage defendants immediately have asked a modification of the order of sale so as to sell for their claims also? and could the Court have refused? If not, what good would be attained by setting aside the sale,



Johnson *vs.* Hambleton, Trustee, *et al.*

unless for other reasons it was apparent a better sale could be effected? In support of his position the counsel for the appellant urged a most plausible argument which it is proper that we should notice. He insisted that if the defendants had paid the amount ordered by the decree to be brought in, they could have secured a dismissal of the bill, and that consideration was conclusive that the sale made was unauthorized. That question is not necessarily before the Court, and we do not mean to decide whether, under the circumstances, the Court would have permitted the bill to be dismissed or not. It was not dismissed, and the question is the right of the respective parties in its present attitude. Without deciding the question, we may properly say that proposition is at least debatable, and we are not ready to say it is sound.

The general rule is that a complainant may dismiss his bill with costs, but it is not without exception, and it has been refused where a suit has brought in co-defendants who, as against each other, are entitled to adjudication of their rights, and costs have been incurred by appearing and establishing their claims. In *Lashley vs. Hogg*, 11 *Vesey*, 602, Lord ELDON under such circumstances refused to permit the bill to be dismissed, holding that "the creditors being made parties by being called in had an interest in the decree" of which they could not be deprived in that way. Following that case and citing it, the Court in *Bethia, et al. vs. McKay, et al.*, *Chevis' Law and Equity Reports*, p. 95, *Equity*, decide the same way. The same rule is laid down in *Bank of State of South Carolina vs. Rose*, 1 *Richardson's (Equity) Reports*, 292, and in *Seymour vs. Jerome*, *Walker's Ch. Rep.*, 356. It is not, as we have said, necessary to pass on that question as the bill was not asked to be dismissed.

In view of the universal practice in the State in such case, to make all junior lien-holders parties, and make an end of suits, by paying all according to priorities under

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Johnson vs. Hambleton, Trustee, et al.

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proceedings in favor of the eldest mortgagee, we cannot hold this decree insufficient to accomplish that purpose and result in this cause, because of seeming inconsistency in its language, or an omission to provide expressly for what was clearly intended. In this view alone, the sale of all the property by the trustee was perfectly proper; but it still remains to inquire into the other branch of this exception, whether the omission to divide the property and sell in parcels, is sufficient ground for setting aside the sale, and ordering a new one. In deciding that this objection is not well taken, we do not mean to disturb the case of *Boteler and Belt vs. Brookes*, nor the later case of *Hubbard and Wife vs. Jarrell, et al.*, 23 Md., 66, but we hold this case materially distinguishable from those cases.

In *Boteler and Brookes*, mortgagor and mortgagee only were parties, and the property could be divided so as to save the mortgagor a part of the estate. In *Hubbard and Wife vs. Jarrell*, the property consisted of sundry distinct, independent and separate parcels, used separately and differently. Here there are sundry *parties and lienholders*—the farm mortgaged is one body of land held and cultivated *in solido* as one farm. It had but one set of farm-buildings, and if it had been divided, it would have been done by arbitrary lines fixed by the trustee, as the Court gave no directions on the subject. If the parties had requested it, the trustee would have been justified in so dividing it, and if it appeared to the Court that the sale was promoted or not injured by it, his action would have been ratified. Such suggestion or request does not appear to have been made, and from the proof we think he was justified in thinking a sale *in solido*, most advantageous and least expensive to the parties. The preponderance of proof to our apprehension, indicates that a sale in parcels would not have produced larger results.

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Johnson vs. Hambleton, Trustee, et al.

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As between mortgagor and mortgagee, Article 16, sec. 125, contemplates the protection of the mortgagor, and the saving to him of part of his estate if possible. So it was decided in *Boteler vs. Brookes*, when this Court construed the Act of 1785, ch. 72, which gave this section to the Code. But that case and the subsequent ones, have contemplated that property should be divisible into parcels beyond any doubt, and that such division and sale would produce more advantageous results.

When there are junior lien-holding defendants, the Court will always direct the sale to be made in such way as will best protect them. 2 *Jones on Mortgages*, 1616.

In this case the interests of all the parties required that the rights of all should be settled finally in one proceeding, without the costs of another, and the Circuit Court was clearly right in overruling this exception.

2. The other objection is, that the Easton Bank's claim, to secure the payment of which the mortgage had been assigned to the Easton Bank, has been paid. So far as this objection proceeds upon the argument, that no decree was passed for the payment of that mortgage, it has been passed upon in what has been said on the preceding point. It is supposed however to reach further, and to deny the capacity of the Easton Bank to be a purchaser at that sale, by reason of section 5137 of the Revised Statutes of Congress. In our view of this case, it is not necessary for us to construe this Act of Congress, or to inquire whether under the facts disclosed in the record, the Easton Bank was justified in buying. It is competent under that Act, for Banks to buy to save claims due them. The record discloses that the Easton Bank has a claim.

The appellant says it has been paid. Conceding that the proof shows it has been so far paid, as to shut out the claim on the property sold, (which we by no means intimate as established,) it would not follow that the Bank could not buy to save it, or had not some other claim not

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Johnson *vs.* Hambleton, Trustee, *et al.*

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disclosed in the record, which it was seeking to protect in making the purchase. The appellant cannot be damaged by the Bank getting an imperfect title, if it were to prove such. It is hard to perceive upon what principle the appellant is justified in interfering to protect the Bank, or to dictate to the Bank what it should or should not do. Mr. Flanagan who might set up the defence against the Easton Bank of payment, does not appear to have done so, but seems to have acquiesced in the legitimacy of the Bank's claim. The junior lien-holders who, if there were good ground for contest, might have been expected to object to the Bank's claim have made no objection on that score, and so far as we know, concede its correctness; and to this appellant it makes no difference whether the Bank is entitled under the mortgage or not, for the mortgage must be paid to Mrs. Flanagan, if it is not paid to the Bank as her assignee. In our opinion, it does not lie in the mouth of this caveator to make this objection; and enough is not disclosed in the record to justify us in setting aside this sale as void, for want of a competent purchaser, when it appears the terms have all been complied with, by cash payments made and security given for the balance to the approval of the trustee and the Court below. The order will be affirmed with costs, and the cause remanded.

*Order affirmed with costs, and  
cause remanded.*

(Decided 15th July, 1879.)

## ABRAHAM B. PATTERSON vs. MARY MILLER.

*Exceptions to Mortgage sale—Effect of omission to Advertise on the day of sale—Question whether the property should be sold in Separate lots as indicated on a Plat dividing the property into Streets and Lots, where no Streets were actually Opened—Effect of a Division of the property into Separate parcels by the location of a Rail road through it, in requiring the Parcels to be sold separately—How much to be sold in such case—How Costs to be paid on setting aside Sale.*

In February, 1871, a mortgage was made of certain property consisting of about twenty-two acres, lying partly in Baltimore County, and partly within the City of Baltimore. Though described in the mortgage as three parcels of land, these were contiguous to each other, and constituted one parcel occupied as a dairy farm. About the year 1872, or 1873, the property was surveyed and laid off into lots and streets, but no improvements were made thereon, no streets were actually opened, nor was there any physical change in the condition of the property, or in its mode of occupation, the lots and streets being merely designated on a map, and marked on the ground by stones placed there for that purpose. The W. M. Railroad was constructed upon the property, crossing it diagonally, so as to completely separate it into two parts, about four acres being on one side of the railroad and the balance on the other side. Under proceedings of foreclosure of the mortgage the property was advertised and sold in one parcel, and was purchased by the mortgagee. The mortgage required "at least twenty days notice of the time, place, manner and terms of sale, in some newspaper published in the city of Baltimore." The advertisement was printed in a newspaper published in said city, the first insertion being on the 11th of March, and the last on the 13th of April. The day of sale was the 18th of April, but through mistake, the advertisement did not appear on the morning of the day of sale as is customary in the City of Baltimore. Accompanying each advertisement, were printed numbers and letters indicating the dates upon which the same would be published, and among these were the 17th and 18th of April, the day of sale and the day before, on both of which it

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Patterson vs. Miller.

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was omitted. The effect of this omission as shown by evidence was to produce the impression upon the public that the sale would not take place. On exceptions to the sale filed by the mortgagor it was HELD:

- 1st. That the omission of the advertisement on the day of sale, was a valid and sufficient reason for setting aside the sale.
- 2nd. That the mortgagee on a re-sale was not bound to offer the property for sale in small lots fronting on the projected streets.
- 3rd. That the two parcels into which the land had been divided by the location of the railroad ought to be sold separately.
- 4th. That if one of those parcels should sell for enough to pay the mortgage and interest, with the taxes and costs, the other should not be offered.
- 5th. That the costs of the proceedings should be paid out of the proceeds of sale.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*William A. Fisher*, for the appellant.

The advertisement itself was deficient in certainty. There is no description of the property by metes and bounds, but only by references to conveyances. There is, in many cases, a loose practice, calculated to do injury to mortgagors, and it was treated as allowable in any instance only by the decision of a bare majority of the Court. *White vs. Malcolm*, 15 Md., 529.

This objection standing alone, would not be sufficient, but it has great weight when taken in connection with other circumstances disclosed by the proof, and especially, that if the advertisement had been in the usual manner, *it must have been described in three distinct parcels.*

The object of an advertisement is to give a just idea of the *value* of the property, as well as of its location. *Ron-*

Patterson vs. Miller.

*kindorff vs. Taylor*, 4 Peters, 362; *Alexander vs. Walker's Lessee*, 8 Gill, 261-2.

The cases above stated were tax sales, but are relied upon as applicable to the advertisements of mortgage sales in *Kauffman vs. Walker*, 9 Md., 240.

It is a principle of general application, in relation to judicial or other sales to be made, for the realizing of indebtedness, that care should be taken to sell no more of the land than a sufficiency to meet the debt. *If the land consists of several parcels, it must be sold in parcels*, or at all events, efforts must first be made to sell it in parcels. It cannot be assumed in advance, that sales cannot be made of some of the parcels for an amount sufficient to realize the debt. *Berry vs. Griffith*, 2 H. & G., 345; *Nesbitt vs. Dallam*, 7 G. & J., 512; *Hewson vs. Deygest*, 8 Johns., (N. Y.) 334-5; *Jackson vs. Newton*, 18 Johns., 362; *Woods vs. Monell*, 1 John. Ch., (N. Y.) 505; *Tiernan vs. Wilson*, 6 Johns. Ch., 413, 414; *Amer. Ins. Co. vs. Oakly*, 9 Paige, 259, relied on in 7 Gill, 293; *Hubbard vs. Jarrell*, 23 Md., 66.

*This property consisted of, and was conveyed in three parcels, each considerable in quantity, in view of their location.*

But even if the land had not consisted of separate parcels originally, the construction of the railroad made two separate tracts, each considerable in size, and useful for different purposes. The evidence shows that the smaller parcel to the north of the railroad, was valuable for coal-yards, lumber yards, and other uses in connection with the railroad, while the parcel on the south side would be for dwellings. The fact that the two last named parcels are essentially different, would be apparent without any oral proof.

In the language of Chief Justice KENT, the obligation to sell in parcels "tends to prevent odious speculations upon the distresses of the debtor." *Woods vs. Monell*, 1 Johns. Ch. Rep., 505.

The course pursued by the mortgagee necessarily prevented the competition of all but wealthy capitalists.

They are few in number, and no great concourse of such persons was to be expected. At least two such persons, Messrs. Rieman and Brown, were prevented from becoming bidders because of the omission of the advertisement on the day of sale, and the day preceding it. Probably there were other persons so deterred.

If such a circumstance is not itself sufficient to abrogate the sale, it is enough when coupled with the other circumstances before referred to.

It is no answer that the mistake was made by the printer.

In *Johnson vs. Dorsey*, 7 Gill, 281, the Court says, that the purchaser in that case was a *stranger*, and that his right could not be disturbed unless the mistake was generated by his own conduct, or could be traced to the mortgagee or the trustee. The Court draws the distinction between mistakes of mere strangers, and those of the mortgagee, as trustee, and their agents or employés.

The mistake of the printer, employed by the mortgagee, is *her own* mistake.

The mistake was observed by Bennett, the auctioneer, as soon as by Patterson. The injury had then been done, and it could only be corrected by postponement of the sale.

If Patterson had omitted to notice it, his rights would not have been affected. But he did go to the Sun office, and direct attention to the omission, and this led to an immediate visit by Mr. Abell to Mr. Schley.

The exceptant has been driven to the necessity of prosecuting his exceptions by the harsh and unjustifiable sale made.

The mortgagee should be compelled to pay the costs; they should not be imposed upon the property. *Tiernan vs. Wilson*, 6 Johns. Ch., 415-16.



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Patterson vs. Miller.

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*William C. Schley*, for the appellee.

The advertisement of the property was in all respects proper and sufficient, and was in fact published for a longer time than either the mortgage or the law required, in order to give ample notice, and to realize the highest price attainable in the depressed condition of real estate. The price obtained was in fact a very excellent one for the property. *Reeside vs. Peter*, 33 Md., 126, 127; *Stevens vs. Bond*, 44 Md., 510-11; *Warehime vs. Carroll*, 44 Md., 515.

The non-publication of the advertisement on the day of sale was in no way attributable to the mortgagee or agents. It was confessedly an oversight of the printer. There is nothing in the mortgage requiring it to be published on the day of sale. There is no law requiring it. *Art. 64, sec. 7, of the Code*; *Warehime vs. Carroll*, 44 Md., 517; *Johnson vs. Dorsey*, 7 Gill, 286.

Even if the Court should believe that the non-appearance of the advertisement on the day of sale, occasioned an impression in the community that the sale would not take place, yet it does not follow that this sale is to be therefore set aside. This Court has said in the case of *Johnson vs. Dorsey*, that if such an impression in fact existed, then it was the duty of the mortgagor, either before or at the sale, to communicate the same to the trustee. *Johnson vs. Dorsey*, 7 Gill, 289.

It is also a significant fact, that not a single witness has said that he would have given more than the property sold for.

The topography is entirely changed by the cutting through of the W. M. R. R., so that it could not have been sold in three parcels, as described in the mortgage, nor in lots, as laid down on the plat filed by the exceptant.

To have sold by the foot on the imaginary streets would have been improper, for the streets may never be opened, or may be changed. *Moale vs. Mayor, &c.*, 5 Md., 322.

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Patterson *vs.* Miller.

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To have laid this property out in lots and streets, and sold it in lots calling to bind on said streets, would have been a dedication to public use of fully one-third of the entire property. Had the mortgagee taken the responsibility of doing this, it would of itself have been a ground for the filing of exceptions. *Hawley vs. Mayor, &c.*, 33 Md., 280.

This sale was made under a power in the mortgage, which is analogous to a sale made under a decree of Court. *Cockey vs. Cole*, 28 Md., 283; *Warehime vs. Carroll*, 44 Md., 518.

This being so, the case of *Gould vs. Chappell*, 42 Md., is not applicable, for in that case the sale was under a will, in which there was "a discretion coupled with a trust," and the distinction between a proceeding of that character, and a sale made under a decree of Court is expressly drawn in that case. *Gould vs. Chappell*, 42 Md., 473.

In addition to which, it appeared that the property in that case was situated entirely in the City of Baltimore, and *two important business streets, already opened, graded and paved, passed directly through it.*

But would the mortgagee, in the absence of instructions to that effect, have been justified in dividing this property into separate pieces? The testimony shows that it is one entire piece of land, occupied by one tenant as a dairy farm, and that some parts of it are much better than others. Is not the mortgagee, in the exercise of a reasonable discretion, to be permitted to sell it in such a way as to make the good carry the bad with it? The cases go no further than to require that where the property is divided into specific farms, which are held by different persons, the sale *shall* be made in distinct parcels. *Hubbard vs. Jarrell*, 23 Md., 83, 84; *Jackson vs. Newton*, 18 Johns., 358, 362; *Wright vs. Yetts*, 30 Indiana, 187-8; *Kiser vs. Ruddick*, 8 Blackford, 383.

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Patterson vs. Miller.

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BARTOL, C. J., delivered the opinion of the Court.

This is an appeal from an order of the Circuit Court of Baltimore City, overruling exceptions, and ratifying a sale made by the appellee under a power in a mortgage.

It appears from the record that the property was purchased by the appellant from the appellee, in February 1871, and to secure the sum of \$26,500, balance of the purchase money, was mortgaged to the appellee. •

It consists of about twenty-two acres, lying partly in Baltimore County, and partly within the City of Baltimore, the larger portion being in the county. Though described in the deed as three parcels of land, these lay contiguous to each other, and at the time of the purchase, constituted one parcel then occupied as a dairy farm, known as "Font Hill." The buildings upon it were worth about \$800, according to the testimony of the appellant.

About the year 1872 or 1873 the property was surveyed and laid off into lots and streets, both the part lying in the county and that within the city limits; but no improvements were made thereon, no streets were actually opened, nor was there any physical change in the condition of the property, or in its mode of occupation, the lots and streets being merely designated on a map, and marked on the ground by stones placed there for that purpose.

The "Western Maryland Railroad" was constructed upon the property, crossing it diagonally; in one part through a "cut" or excavation of the depth of about twenty feet, and in another part upon a "fill" or embankment eight to twelve feet high, thus completely separating the land into two parts, about four acres being on the north side of the railroad, and the balance on the south side.

The property was advertised and sold in one parcel, as described in the mortgage, and was purchased by the mortgagee.

The appellant filed exceptions to the sale as follows :

1st. Because the advertisement of the time, manner and terms of sale, was not made for the period required by law, and by the mortgage.

2nd. Because said sale was not advertised as required by law, and said mortgage.

3rd. Because the advertisement was not inserted on the day of sale; and purchasers were misled thereby, and failed therefore to attend the sale.

4th. Because the property consisted of three parcels, when conveyed by the mortgage, and afterwards these were divided into parts by the construction of the Western Maryland Railroad through the parcels, and yet the mortgagee advertised and sold all the lands, as a whole, and in no parcels.

5th. Because the streets had been located through the lands by competent authority of law, and all sales of property in the neighborhood have been made by fronts on streets and in lots, nevertheless the mortgagee offered the property as a whole only, and not with reference to streets or in lots.

6th. Because the property ought not to have been sold in one parcel.

7th. Because the price at which the property was purchased by the mortgagee was grossly inadequate.

8th. For other reasons to be presented at the hearing.

The *first* and *second* exceptions are not supported by the proof. The mortgage requires "at least twenty days' notice of the time, place, manner and terms of sale, in some newspaper published in the City of Baltimore."

The advertisement was inserted in the "*Baltimore Sun*," and also in the "*Maryland Journal*," a newspaper printed in Baltimore County, for more than twenty days before the sale, and contains a full and sufficient description of the property to be sold.

The *third* exception raises a more serious question, and when considered in connection with the proof in the cause

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Patterson vs. Miller.

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presents, we think, a valid and sufficient reason for setting aside the sale.

The advertisement was printed in the "Sun" March 11th, 13th, 23rd, 30th, April 2nd, 6th, 9th and 13th.

The day of sale was the 18th of April; but through a mistake which occurred in the printing office, the advertisement did not appear on the morning of the day of sale, as is customary in the City of Baltimore.

The effect of this omission, as is very clearly shown by the evidence, was to produce the impression upon the public that the sale would not take place, and this impression was occasioned not only by the absence of the advertisement on the day of sale; but by the further fact that accompanying each advertisement were printed numbers and letters, the meaning of which was generally understood, indicating the dates upon which the same would be published; and among these were *A. 17th and 18th*, the day of sale, and the day before; on both of which days it was omitted.

It is true, as suggested by the appellee's solicitor, that the notice of sale was published for the period of time required by the mortgage, and that this did not, in terms, require the notice to be published on the day of sale; but such a publication being customary, and it having been announced in each advertisement, that it would be published on the day of sale, the natural effect of its omission on that day, was to mislead the public, and produce the impression that the sale would not take place; and the evidence shows that a number of persons were actually so misled.

Mr. Bennett, the auctioneer, it appears, not seeing the advertisement on the 18th, supposed the sale would not take place. Mr. Patterson testifies that such an impression was general in the community, and names *Mr. John A. Hambleton* and *Mr. George Gildersleve*, as two persons who were so misled and who intended to go to the sale. Both

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Patterson vs. Miller.

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*Mr. Alexander Rieman* and *Mr. Vachel Brown* testify that they had seen the advertisement, and intended to go to the sale and to bid for the property; but not seeing the advertisement on the day of sale, they were thereby prevented from attending, supposing the sale would not go on.

The object of the advertisement is to notify the public when and where the sale will take place, so that persons wishing to buy may attend; but where it clearly appears that this object has been defeated, and purchasers have been kept away by an accidental omission of the advertisement at the very time when the public, and all parties interested look for it, and expect to see it; it seems to us that the sale ought not to be ratified.

As in our opinion the sale ought to be set aside for the reason stated, and a re-sale made, it is proper that we should pass upon the other exceptions.

Looking at the whole evidence in the cause, we think the mortgagee was not bound to offer the property for sale in small lots fronting on the projected streets as indicated on the plat, exhibited by the appellant. The effect of offering the property in that way, would be to dedicate about one-third of it to the public for streets, lanes and alleys. *Moale vs. Mayor, &c.*, 5 Md., 322, which, in the present situation of the property, seems to us would not be a judicious course of proceeding, as the streets may never actually be opened as they are designated on the plat.

It is very doubtful, according to the evidence, whether a sale in that mode could be effected consistently with the rights and interests of the mortgagee or advantageously to the appellant.

At the same time, we think the whole of the land described in the mortgage ought not to be offered for sale, in the first instance, in one parcel. The construction of the Western Maryland Railroad, in the manner before described, has changed the topography of the land, divid-

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State *vs.* Mayor, &c. of Baltimore.

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ing it into two distinct parcels, completely separated from each other in such way that they can no longer be used or occupied conveniently together. Recognizing this change, and the actual situation of the property, as it now is, the duty of the mortgagee is, in the first instance, to offer these parcels for sale separately.

The evidence in our judgment shows that, if so offered, the property would attract a larger number of bidders and sell for a better price.

If one of the parcels should sell for enough to pay the mortgage debt and interest, with the taxes and costs, the other parcel should of course not be offered, as the mortgagee ought not to sell more of the land than is sufficient for that purpose.

The order of the Circuit Court will be reversed, and the cause remanded, the costs of this proceeding to be paid out of the proceeds of sale.

*Reversed and remanded.*

(Decided 15th July, 1879.)

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THE STATE OF MARYLAND *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE. THE MAYOR AND CITY COUNCIL OF BALTIMORE *vs.* THE STATE OF MARYLAND.

*Construction of the Bounty Act of 1864, ch. 15, as to how the Money drawn thereunder from the State by the City of Baltimore was to be applied—Question as to the power of the State to make the City liable for the misapplication by the City Register of funds required by said Act to be disbursed by him—Construction of the word “Misapplication,” as*

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State vs. Mayor, &c. of Baltimore.

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*applying to cases of payment to the Wrong person or to the same person Twice—Discretion of the Register as to how each Payment should be made and how Evidenced—Sufficiency of Evidence to show that Vouchers of payments alleged to be Lost, once existed—Sufficiency of Evidence of their loss so as to render Secondary evidence of their Contents admissible—Payments made under the Act of 1864 not affected by the Act of 1867, ch. 167, requiring different Vouchers from those required by the former Act.*

The Act of 1864, ch. 15, authorized the Governor to offer a bounty to persons volunteering to serve as a part of the quota of this State in the armies of the United States; a portion of the amount to be paid at the time of being mustered into service, a portion at the end of each month of service for the five months immediately ensuing, and the balance at the expiration of the time of service or upon honorable discharge therefrom. By said Act the Commissioners for the several counties, and the Mayor and City Council of Baltimore, "upon forwarding to the governor *properly authenticated lists*, of volunteers mustered under this Act, in their respective Counties and the City of Baltimore, are hereby authorized and empowered *upon the certificate of the Governor* to draw upon the Treasurer for the sum or sums necessary to pay the cash and monthly payments to which *said volunteers* would be entitled, as the same may become due, retaining in the Treasury the balance until the expiration of their terms of service." A large number of such lists duly authenticated by the proper military officials, and termed "Governor's Rolls," were forwarded to the Governor. Upon the receipt of each the Governor appended thereto his certificate, directed "To the Mayor and City Council of Baltimore," certifying the authenticity of the list, and that the volunteers mentioned therein, were properly to be credited to the City of Baltimore, and that "*you*" are entitled to receive from the Treasury of the State the amount specified in the certificate as required to make the cash and monthly payments to the volunteers named in the list; and that "*you* are therefore authorized to draw upon the Treasurer of the State for said amount as per draft hereto annexed, which you will sign and present at the Treasury." Payment of such amount was in each case made upon a draft endorsed upon the certificate, and signed by "J. A. T., City Register," each draft stating that the amount drawn for was "required to make the cash and monthly payments to the" \* \* \*



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State *vs.* Mayor, &c. of Baltimore.

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"volunteers within named under the provisions of the Act" of 1864. **HELD:**

That this action was in strict compliance with the provisions of the Act of 1864, by the terms of which the money so drawn from the treasury, should be applied *only* for the purpose of making the requisite payments to or for the benefit of the persons whose names should appear *on the list* thus forwarded to and certified by the Governor.

The same Act provides "That the County Commissioners and the Register of the City of Baltimore shall disburse the sums so coming into their hands, and *shall keep a record thereof*; but no County or the City of Baltimore shall draw for and be paid a larger sum than may be necessary for their respective quotas; and the several Counties and the City of Baltimore shall be liable to the State for any *misapplication* of the said funds by the County Commissioners or the City Register. In an action by the State against the Mayor and City Council of Baltimore, it was **HELD:**

1st. That it was competent as well as just for the Legislature to impose upon the Counties and the City of Baltimore liability for the default of such officers appointed by the Mayor and City Council, or elected by the people of the counties, as it might designate as the proper agents to disburse the said money in the mode and manner provided.

2nd. That disbursements to parties whose names do not appear on the "Governor's Rolls," or payment to the same person more than once, were *misappropriations* within the meaning of the statute for which the city was properly liable.

3rd. That whether payment should be made to each volunteer in person, or upon his order, and whether such order should be in writing, and how evidenced, were all matters intrusted to the discretion of the Register, and his decision thereon, if honestly made, was final.

By a resolution of the Mayor and City Council, the Register was authorized to employ an additional clerk to assist him in discharging the duty of disbursing said bounty money. This clerk, together with the Register himself, who made most of the disbursements, and his successor in office who made the rest, all testified to the effect that it was the invariable practice of the Register's office to require proper and sufficient powers of attorney, orders, or assignments, and in all cases of doubt to consult the City Counsellor: that such orders or powers of attorney were in all cases before

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*State vs. Mayor, &c. of Baltimore.*

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them when disbursements were made thereon; and that in no case would any payment have been made without the production and existence of such vouchers. The testimony of these Registers and their clerk was corroborated by that of a large number of witnesses who had dealings with the office and to whom payments were made upon powers of attorney not produced in evidence.

HELD:

- 1st. That this proof was sufficient to establish the fact, that vouchers which the Register in good faith decided to be sufficient to authorize payments thereunder, in cases where they had not been produced, and were alleged to be lost, once existed.
- 2nd. That the loss of these papers, and an unavailing and sufficient search for them in the places where they were kept, and where they ought to have been found if in existence, were sufficiently established by the proof to render the testimony of said witnesses admissible to prove the contents of these lost vouchers; and that under the circumstances of the case their contents were sufficiently proven, to justify the exoneration of the city from liability for the payments in dispute made thereunder.
- 3rd. That as the disbursements in controversy were all made under the provisions of the Act of 1864, the Register could not be required under the Act of 1867, ch. 167, to produce any different vouchers from those he was required by the Act of 1864 to keep.

CROSS APPEALS from the Superior Court of Baltimore City.

This action was brought by the State of Maryland against the Mayor and City Council of Baltimore to recover:

1. Money paid by the plaintiff for the defendant, at its request.
2. And for money received by the defendant, for the use of the plaintiff.
3. And for money found to be due from the defendant to the plaintiff, on accounts stated between them.
4. And for that, John A. Thompson, Register of the said Mayor and City Council of Baltimore, received from said State certain sums of money, to be disbursed by him

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State *vs.* Mayor, &c. of Baltimore.

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under the Bounty laws of the said State; but the said Register did not disburse the same in accordance with said law, but misapplied the same.

The defendant pleaded *non assumpsit* and *nil debet*, and on these pleas issues were joined.

The cause was then referred to the auditor of the Court, by consent of counsel and sanction of the Court.

After the report of the auditor was made, accompanied by depositions taken before him, the nature of which is sufficiently stated in the opinion of this Court, the cause was submitted by agreement of counsel to the Court below for determination, without the intervention of a jury.

At the trial prayers were offered on the part of the plaintiff and defendant which it is not necessary to insert, as the Court, (DOBBIN, J.,) in his action thereon stated that he referred more particularly to the following opinion as indicating more exactly his ruling:

"This action is instituted by the State against the city, to recover from the latter such balance of the sum of \$830,250, as may remain in its hands after crediting all proper payments on account of enlisted volunteers in the late war, under the Act of Assembly of 1864, chap. 15, sections 6 and 7. That Act, in substance, provided, that the counties and the City of Baltimore should respectively draw upon the Treasurer of the State of Maryland, for the sums necessary to pay the cash and monthly payments of such volunteers as should be mustered into service, and be certified to the Governor upon properly authenticated lists, of the disbursements of which, the County Commissioners and the Register of the city were to keep a record, and the counties and the city were to be held liable for any misapplication of said funds.

"Under the provisions of this Act, the Mayor and City Council of Baltimore furnished to the Governor, properly authenticated lists of the volunteers mustered in as the

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State *vs.* Mayor, &c of Baltimore.

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quota of the city, and received the sum above named, to be paid to the volunteers so mustered in.

“Upon being called upon to render its record of disbursements, it is found that payments have been made to persons not on the lists furnished to the Governor, and to others upon alleged insufficient evidence of the right to receive such payments, and upon other names payments have been made twice, and for their alleged misapplication of funds, the State seeks to hold the city liable in this action.

“Preliminary to the questions of accountability as between principal and agent, which are thus raised, the city defends itself upon several grounds going to the right of the State to recover at all. These are, that it was not competent for the State to impose upon the city the duty of disbursing the bounties in question, and that whatever was lawfully imposed by the Act was upon the Register personally, who was thus made the State's agent in that behalf, and could not involve the city in any responsibility for his default.

“To this view I cannot subscribe. It is abundantly shown by authority and upon principle, that the State was acting within its constitutional authority in adopting this method of relieving its citizens from the burthen of an involuntary draft, and that it had the right to use the agency of municipal officers to carry this purpose into effect.

“It will further appear upon a proper construction of the Act, that the State was dealing directly with the counties and the city, and their corporate municipal relations, and that mention is made of ‘County Commissioners’ and of the ‘Register,’ only as the proper agencies through whom such dealings were to be consummated, the liability of the counties and city, respectively, for any misapplication of the funds, being expressly reserved. Nor did it require any acceptance on the part of

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State *vs.* Mayor, &c. of Baltimore.

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the counties and city to make the duty imposed by the Act obligatory upon them.

"The State had a right to impose it, as a public duty, even against their will.

"But if such acceptance should be thought necessary, it will be found in the fact that those bodies respectively furnished the properly authenticated lists to the Governor, upon the basis of which the money was drawn from the treasury. I think, therefore, that no defence can be successfully founded upon these objections, and that the City of Baltimore must account for the proper disbursement of the fund within the purposes of the Act. The question is now, how far has it so accounted?

"The city was entitled to draw these funds only for names on the lists furnished to the Governor. To the extent to which it claims credit for payments to, or on behalf of, any names not on their lists, I think it very clear that the claim cannot be allowed. So, also, where it has been paid twice upon the same name, it should be credited with one payment.

"The material question is, how far is the city discharged by the proof in the cause, as to payments made to or on behalf of names on the Governor's lists? In considering this question, it must be borne in mind that the defendant is the City of Baltimore, a municipal corporation, which can only act through agents, and the fact to be proved is the payment of these moneys to or on behalf of the persons on the Governor's lists.

"Payment is a fact which may be proved by the oral testimony of any *witness who has knowledge of it*, and who will swear to it.

"In a case like this, involving dealings with more than three thousand persons, strangers to him, he need not have distinct recollection of each individual, and of the payment to him, *but if he has made a record at the time*, and producing the record is able to testify from it, he has done all that the case can reasonably require of him.

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State vs. Mayor, &c. of Baltimore.

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"In this case, the city produces John A. Thompson, Jr., a witness not attempted to be impeached, who swears that he was a clerk in the office of the Register of the city; that he produces the records in which the payments are entered; that all the payments claimed were in fact made to the enlisted parties themselves, or to persons lawfully authorized by them to receive them. There is, besides, other strong corroborative proof not necessary to be here referred to. This would seem to be sufficient to discharge the city, unless it be considered that the State has a right to review the authority upon which payment was made to others than the soldiers themselves, and recover for any mistake in judgment the disbursing officer may have made, though he may have acted honestly, and the State may have suffered no loss by reason of such mistake. It must be remembered that there is no fraud or corrupt dealing charged or intimated in this case; as the proof stands, the money was honestly paid to somebody, and the State has received the military service of some one as the equivalent of such payment; it is moreover admitted that no claim has been made against the State for money alleged to have been paid by the city. The question as to the authority of the payee to receive the payment, was strictly a judicial question, and as between the State and the city, its determination rested alone, in the absence of any other provision, with the officer charged with making the payment. If he has performed that duty honestly, the State has no right to review his judgment, and make the city responsible for his error, especially where the State has suffered no loss by it. The only requirement of the Act of Assembly in this case is, that the disbursing officer shall keep a record of his disbursements. This the city has done, and adds to it the proof, by witnesses, that all the money claimed to have been paid to the persons named in the Governor's lists, was in fact paid to them, or to persons authorized by them to receive it.

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State vs. Mayor, &c. of Baltimore.

“ This would seem to be sufficient under the ruling of Judge STORY in *Allen vs. Blunt*, 3 Story, 745, in which he says: ‘ It may be laid down as a general rule, that when a particular authority is confided to a public officer, to be exercised by him in his discretion, upon an examination of facts of which he is made the appropriate judge, his decision upon those facts is, in the absence of any controlling provision, absolutely conclusive as to the existence of those facts.’

“ But this is not the only view the record before me presents. It is proved by the witnesses that when payments were made to others than the soldiers themselves, it was the invariable practice of the Register’s office to require legally sufficient powers of attorney or assignments, justifying such payments, and the witness, Thompson, Jr., swears to his belief, that he made all the payments objected to on such papers, and proof was offered tending to show the loss of such papers, and an unavailing search for them in the places where they should be found. The once existence of a paper, its loss and the sufficiency of a search for it, are questions for the Court; and I do not hesitate to say, no fraud being charged, that if I were trying this case before a jury, I should admit secondary evidence of the contents of such papers.

“ Is there then any objection to such evidence as legally admissible to go to a jury? I recognize no such inadmissibility. When a paper or record is alleged to be lost, which, by the uniform usage of a public office must have existed to justify some proceeding, the evidence of which does exist, surely such usage may be proved to the jury, in connection with the proof of the fact from which its existence may be inferred. Here the payment is proved, and the record of such payment is preserved in the handwriting of the person who made it. Surely his testimony that he would not have made it without the production to him of the proper authority to justify his making it, ought to go to the jury for what it is worth. If then it

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State vs. Mayor, &c. of Baltimore.

is, as matter of law, admissible to go the jury, the only remaining question is, is it sufficient as matter of fact to satisfy me, acting in the place of a jury, of the actual payment, upon legally sufficient authority, of the sums claimed by the city to have been paid?

“Looking at the class of people, who were for the most part the recipients of this money, their uncertainty of habitation, and the great difficulty of finding them; looking at the fact that no claim has been made on the State on behalf of any of them since the war, notwithstanding the well known diligence and enterprise of those who were engaged in the business of attending to bounties; and looking at the fact that no charge of fraud is made or intimated, I do not hesitate to acquit the city of all claim by the State, except for such sums as may be paid to or an account of persons not on the Governor’s lists, and for such sums as have been erroneously paid a second time. The auditor of the Court, to whom the parties and the Court are already indebted for a most lucid and exhaustive examination of this case, will state the liability of the city in conformity with this opinion, when I will enter a verdict and judgment accordingly.

“My opinion is herein sufficiently indicated to render it unnecessary to pass separately upon the propositions submitted to me.”

The auditor stated an account in accordance with said opinion, which was adopted by the Court, and verdict and judgment were entered accordingly.

Both the plaintiff and defendant appealed.

The cause was submitted on briefs to BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON, and IRVING, J.

*A. Leo Knott and Charles J. M. Gwinn, Attorney General,*  
for the State.

The question, in a case tried by the Court, without the intervention of a jury, is, whether the evidence upon which



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State vs. Mayor, &c. of Baltimore.

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the Court acted was legally sufficient to lead the Court to the conclusions which it reached by its particular determinations. *Sheppard and Jones vs. Willis and Ravel*, 28 Md., 633, 634.

It was provided by the Act of 1864, chapter 15, that the Governor should notify the Commissioners of the several counties and the Mayor and City Council of Baltimore of the number of men for which they were liable under drafts to be made under existing calls by the Federal Government; and the said Commissioners, or Mayor and City Council, upon forwarding to the Governor properly authenticated lists of volunteers mustered in under the Act in their respective counties and in the City of Baltimore, were *authorized and empowered*, upon the certificate of the Governor, to draw upon the Treasurer for the sum or sums necessary to pay the cash and monthly payments to which said volunteers would be entitled, as the same might come due; retaining the balance in the treasury until the expiration of the term of service of such respective volunteers.

The Act of 1864, chapter 15, did not impose upon the Commissioners of the several counties, or upon the Mayor and City Council of Baltimore, any *obligation* to receive the money in question. The Act only enabled them, respectively, to obtain such money from the State, if they saw proper to relieve their populations from the inconvenience of the proposed drafts by procuring, by means of bounties, a sufficient number of volunteers. They were, respectively, at liberty to become the disbursing agents of the State for this purpose, or to decline the trust.

The Superior Court of Baltimore City found as facts that the Mayor and City Council of Baltimore furnished to the Governor properly authenticated lists of the volunteers constituting the quota of the city, and received, through its proper officer, from the State the sum of \$830,250, to be paid to such volunteers.

*State vs. Mayor, &c. of Baltimore.*

Under the sixth and seventh sections of the Act of 1864, chapter 15, the Register of the City of Baltimore was directed to disburse the money thus paid to the enlisted volunteers credited to the City of Baltimore, as the same might become due, and to keep a record of such disbursements; and it was provided that the City of Baltimore should be "*liable to the State for any misapplication of said funds by the said City Register.*"

The office of Register of the City of Baltimore is designated in Article 4, section 25, of the Code of Public Local Laws. The duties of the officer are, in general, defined by the ordinances of the City of Baltimore.

Under section 7 of Ordinance No. 8, page 7, of the Revised Ordinances of 1850, it was made the duty of the City Register to keep regular and correct accounts in a book, or books, in folio, of all money received and expended by him on account of the city, particularly stating, under proper heads, the specific objects from whence received, and for what expended; and to lay annually before the City Council, in the first week of the annual session of that body, his account of *all* moneys received and expended by him during the past year, supported by proper vouchers.

The Mayor of the City of Baltimore had, under this ordinance, also the power to require the Register to exhibit to him *all* his accounts and vouchers, his bank-book and crossed checks. *Ordinance 1850, No. 8, section 7.*

It will be seen, by reference to Article 37, section 6, page 645 of the City Code for 1869, that the duties of the City Register, in the particulars referred to, remained unchanged in that interval of nineteen years. Indeed, the provisions of section 22 of Article 11, pages 165, 166, of the City Code for 1879, show that the duties and obligations of the City Register, in the particulars referred to, have not been changed since 1850.

It was, therefore, the duty of the City Register to keep an account of the particular moneys belonging to the

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State vs. Mayor, &c. of Baltimore.

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State, which he received from the Mayor and City Council of Baltimore, by virtue of his office as Register, and which he expended under the Act of 1864, chapter 15, and of his expenditures of that money in each year; and this account he was required to support by proper vouchers.

The Act of 1867, chapter 167, had no other purpose or effect, except to impose upon the City Register the additional duty of reporting to the Comptroller of the Treasury, within the period which it prescribed, the accounts and vouchers connected with the distribution of the bounty fund, which it was the duty of the City Register to have kept and preserved.

The Mayor and City Council of Baltimore form a corporation, which was established for public political purposes, and as one of the means to be used by the State in the administration of public affairs. *Mayor, &c. vs. State*, 15 Md., 462. It was, certainly, within the power of the State to compel this municipal agency to receive into its treasury any sum of money intended by the State to be applied to public uses; to require such money to be disbursed by the officer of the city corporation to whom the duty of keeping and disbursing the money of the city was entrusted; to impose upon him the duty of accounting for such money in the manner in which it might prescribe; and to make the city responsible for the proper application of such money by the officer to whose keeping it was confided. *Mayor, &c. vs. State*, 15 Md., 492; *County Commissioners of Anne Arundel County vs. Duckett*, 20 Md., 477; *U. S. vs. Railroad Company*, 17 Wallace, 329; 1 *Dillon on Munic. Corp.*, (2nd Ed.,) section 168.

Nor can there be any question that the Mayor and City Council of Baltimore voluntarily assented, for itself and its Register, to the obligation imposed upon it by the Act of 1864, chapter 15; for, by Ordinance No. 47, approved March 15th, 1864, the Mayor and City Council of Baltimore appropriated the sum of one thousand dollars for

State *vs.* Mayor, &c. of Baltimore.

the purpose of paying for the services of an additional clerk, and for the books, paper and printing necessary to the payment of the bounty allowed by the State; and the Register of the city was authorized to employ such clerk, and to obtain such books, paper, etc., with the amount thus allowed.

The General Assembly, by the Act of 1864, chapter 15, sections 6 and 7, authorized the Mayor and City Council of Baltimore to receive the moneys therein referred to from the State. It directed the Register of the city to disburse this fund and to keep a record thereof. It declared that the City of Baltimore should be responsible for any misapplication of said funds. There can be no doubt that the Act, by its designation of the city officer who should perform the duty of disbursing this bounty money, in effect required that the officer thus designated should receive and disburse all portions of this fund in the manner in which he was required to disburse all public moneys, expended by him in his official character.

The State must certainly be supposed to have intended to avail itself of the obligation imposed upon the Register by the city ordinance, to which we have referred to keep an account, supported by proper vouchers, of all moneys received and expended by him.

That this was the intent of the Legislature plainly appears by the Act of 1867, chapter 167, which, in effect, directed the Register to make report to the Comptroller, in detailed form, of the amounts of bounty money which he had disbursed and of the names of parties to whom payments had been made, together with the proper vouchers therefor.

The Mayor and City Council of Baltimore had the power to protect itself fully from the responsibility for the Register, which was devolved upon it by the Act of 1864, chapter 15, by requiring the Register to give an additional bond for the indemnification of the city against any loss from his misapplication of this particular fund.

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State vs. Mayor, &c. of Baltimore.

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*James L. McLane, City Counsellor*, for the Mayor and City Council of Baltimore.

By the Act of 1864, chapter 15, the City Register, and not the *municipal corporation*, was constituted the agent of the State for the disbursement of its bounties, and nothing in the law justifies the attempt to hold the city for the acts of such State agent.

That the service required of the City Register was peculiarly a public or State service, appears on the face of the Act itself. It is entitled "An Act to aid and encourage enlistments into the Maryland Regiments in service of the United States." Its first section provides a bounty of three hundred dollars for every person who should enlist to serve "*as part of the quota of this State in the armies of the United States.*"

In like manner "to every person who shall have already been in service six months and shall re-enlist before the 1st day of March next, *to serve as aforesaid, State bounty, of three hundred dollars.*"

By section 6, the Governor was to ascertain what number of men the several counties and the City of Baltimore should furnish, under existing calls, and apportion the State bounty fund accordingly.

By section 7, the said County Commissioners and the Register of the City of Baltimore shall disburse the sums so coming "into their hands, and shall keep a record thereof; but no county nor the City of Baltimore shall draw for and be paid a larger sum than may be necessary for their respective quotas; and the several counties and the City of Baltimore shall be liable to the State for any misapplication of the said funds by the County Commissioners or City Register."

That the Register for the time being, and not the municipal corporation, was regarded as the State's agent, by all concerned in the execution of the law, is abundantly proved by the dealings of the parties themselves.

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State *vs.* Mayor, &c. of Baltimore.

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There has been no attempt to prove that the municipal corporation, by either ordinance or resolution, ever authorized the City Register or any other city official to prepare and forward to the Governor the authenticated lists of volunteers, and to draw upon the State Treasurer for the bounty fund as provided in section 6 of the Act of 1864, ch. 15. The fact is beyond dispute that the Mayor and City Council of Baltimore took no such action in the premises. From the beginning, the City Register regarded himself as fully authorized to receive and disburse the fund as the agent of the State, in no way accountable to the municipal authorities—as such, he was uniformly recognized by both the Governor and the Treasurer. And the entire bounty fund was paid to him upon drafts drawn without any direction from the city.

When the Act of 1867, ch. 167, requiring “the *several parties*, or bodies corporate, intrusted with the distribution of these bounty funds to report to the State Comptroller,” was passed, John A. Thompson, who had been out of office for more than a year, and not the Mayor and City Council of Baltimore, was called upon by the State Comptroller for an account of his disbursements, and was allowed to deposit with the Comptroller a box of vouchers, which, upon the theory of the State’s case, clearly belonged to the municipal corporation, and should have been in its custody. In all this, the Comptroller, as the Governor and Treasurer before him had done, dealt directly with Thompson as its agent.

The provisions contained in section 7 of the Act, and now relied on by the State, “that the several counties and the City of Baltimore shall be liable to the State for any misapplication of the said funds by the County Commissioners or City Register,” does not in any way conflict with the interpretation put upon the Act by all the officials, State and city, who were required to act under it. By that provision, nothing more was intended than to

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State vs. Mayor, &c. of Baltimore.

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guard against the State's funds being used for county or city purposes. From being "misapplied" in the sense of being applied to uses other than those for which the fund had been specially set apart. So long as the Register in good faith applied the funds intrusted to him to the payment of State bounties, there was no such "misapplication" as the Act of Assembly could have intended to make the city liable for.

To this extent the provision making the city liable was most reasonable. The city could rightly be made responsible for any misapplication of the fund by its Register *acting in his capacity of an officer of the municipal corporation*. Because, as such, he was absolutely subject to municipal control. But for losses resulting from mistakes of judgment or neglect of duty on the part of the Register while acting as the State's agent, or disbursing officer, the Register and not the municipal corporation must be looked to.

The control of the Legislature over the municipal corporation, so fully recognized by the decisions of this Court, does not extend to a case like the present. The cases relied upon by the State at the trial of the case, established nothing more than the proposition that public officers *appointed by the State to perform municipal functions*, can render the corporation liable to *third parties*, to the same extent as if such officials had been appointed directly by the municipal corporation.

"The power of the Legislature over such corporations is not absolute or unlimited." *Pumphrey's Case*, 47 Md. 152.

The duty imposed must fall within the ordinary functions of municipal government. *Cooley on Con. Lim.*, 230, 231; *People vs. Batchelor*, 53 N. Y., 128.

While it may very well be that the State can avail itself of the machinery of city government for the disbursement of a State bounty fund, it by no means follows that it can

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State vs. Mayor, &c. of Baltimore.

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require the tax-payers of the city to *guarantee* the faithful and intelligent discharge of *public* duties, by any one of the city officials, upon whom the State shall see fit to impose duties clearly beyond the scope of such officer's *municipal appointment*, and not embraced in his official bond.

The evidence tending to prove payments, objected to by the State, was clearly admissible. The Act of 1864, chap. 15, prescribed no particular form of payment or receipt. The only requirement was that the Register should keep a record of his disbursements. Whether payment should be made to each soldier in person, or upon his order, and whether such order should be in writing and how evidenced, were all matters confided to the discretion of the Register, and his decision thereon was absolutely final. *Allen vs. Blunt*, 3 Story, 742; *Noble vs. U. S., Devereux Court of Claims*, 84.

The Register could not be required under the Act of 1867, chap. 167, to produce any different vouchers from those he was required to keep by the Act of 1864, chap. 15. Having produced his record of disbursements, and its correctness being disputed, upon what principle of justice can he be denied the right to prove the fact that the disbursements were in fact made as claimed? Here the proof is furnished by the person who actually made every one of the payments.

John A. Thompson, Jr., swears that in all cases where he paid the parties themselves, he was first satisfied that they were properly entitled to receive the bounty, and that in all such cases he took receipts.

In all cases where payment was made to attorneys or agents of soldiers, he required the production of written authority or powers of attorney, and that such papers were left in the Register's office upon the retirement of his father.

If the Act of Assembly had prescribed any particular form of voucher, whether power of attorney, money order,



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State vs. Mayor, &c. of Baltimore.

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or receipt, it was clearly competent for the defendant to establish the existence of such vouchers by the evidence offered at the trial.

The proof by Thompson, Jr., and Plummer was, that the *invariable practice* of the Register's office was to require proper and sufficient powers of attorney, orders or assignments, and in all cases of doubt, to consult the City Councillor.

Twenty-three persons, who had dealt with the office, and collected soldiers' bounties in a great number of cases, proved the same practice of the office, and that they were always required to conform to it. Thompson, Jr., proved the loss of the papers; and an unavailing search for them in the places where they should have been found, was proved by Thompson, Jr., and the State's own witness, Woolford, *under whose desk the papers relating to the bounty business which had been forwarded by the city register have been kept in an open box for several years.*

A public officer is competent to prove that according to the *invariable practice of his office*, certain entries made by him as such public officer, could only have been made upon the production and filing with him of a certain *written instrument*, the existence of which is the subject in dispute. *Bouldin vs. Massie's Heirs*, 7 Wheat., 122.

MILLER, J., delivered the opinion of the Court.

This cause, in which cross appeals have been taken, was tried before the Court without the intervention of a jury. and in such case, equally as in jury trials, only questions of law are open for review in this Court. Those questions in the present case are but few, and do not require an examination of all the numerous provisions of the several Bounty Acts referred to in the record and in argument. Some of the rulings of the Superior Court, however, present questions as to the validity, construction and effects of certain parts of those laws, and these must be briefly stated.

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State vs. Mayor, &c. of Baltimore.

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1st. By the Act of 1864, ch. 15, (which was the first of these laws,) the Governor was authorized to offer a bounty of \$300 to every person, who should before the 1st of March, 1864, voluntarily enlist to serve, as part of the quota of this State, in the armies of the United States, and of this sum it was provided that \$150 should be paid at the time such person should be mustered into the service of the United States, and \$20 at the end of each month of service for the five months immediately ensuing, and \$50 at the expiration of his term of service or upon his honorable discharge therefrom. By another section of the same Act it was provided "that the Governor shall, as soon as may be, notify the Commissioners of the several counties, and the Mayor and City Council of Baltimore, of the number of men for which they are liable to be drafted under existing calls by the Federal Government, and the said Commissioners or Mayor, or City Council, upon forwarding to the Governor *properly authenticated lists* of volunteers mustered in under this Act, in their respective counties and the City of Baltimore, are hereby authorized and empowered, *upon the certificate of the Governor*, to draw upon the Treasurer for the sum or sums necessary to pay the cash and monthly payments to which *said volunteers* would be entitled, as the same may become due, retaining in the Treasury the balance until the expiration of their term of service."

The testimony in the case shows the mode in which this provision of the law was executed. A large number of these lists, duly authenticated by the proper military officials, were forwarded to the Governor, and are termed in the record the "Governor's Rolls," and we shall take the first one as illustrating what was done in the case of each and all of them. This list contains the names of one hundred and twenty-four persons, and upon its receipt the Governor appended thereto his certificate, directed "To the Mayor and City Council of Baltimore," stating in sub-

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State *vs.* Mayor, &c. of Baltimore.

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stance that "having been furnished by the proper authorities with authenticated lists of a portion of the volunteers from this State who have been mustered into the military service of the United States, and who are entitled to the State bounty provided" by the Act of 1864, and that "it appears by the lists so furnished that the volunteers mentioned and described in the annexed list are properly to be credited to Baltimore City as part of the State's quota of men called for by the President's Proclamations," and "*you* are therefore, in accordance with the Act of the Legislature referred to, entitled to receive from the Treasury of the State the sum of \$31,000, being the amount required to make the cash and monthly payments to the one hundred and twenty-four volunteers whose names are hereby appended," and "*you* are therefore authorized to draw upon the Treasurer of the State for said amount as per draft hereto annexed, which you will sign and present at the Treasury." Then follows, endorsed upon this certificate, the draft upon the Treasurer, signed by "John A. Thompson, City Register," for that sum, "it being the amount required to make the cash and monthly payments to the one hundred and twenty-four volunteers within named, under the provisions of the Act" of 1864, upon which the money was duly paid by the Treasury officers to the Bank named as payee therein. It is very clear that this action was in strict compliance with this provision of the law, for its terms plainly enough declare that the money so drawn from the Treasury should be applied *only* for the purpose of making the requisite payments to, or for the benefit of, the persons whose names should appear *on the lists* thus forwarded to and certified by the Governor.

Then in order to secure the proper disbursement of the money taken from the Treasury and received by the city and counties, it was provided by another section of the same Act "that the said County Commissioners and the Register of the City of Baltimore shall disburse the sums

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State vs. Mayor, &c. of Baltimore.

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so coming into their hands, *and shall keep a record thereof*; but no county nor the City of Baltimore shall draw for and be paid a larger sum than may be necessary for their respective quotas; and the several counties and the City of Baltimore shall be liable to the State for any *misapplication* of the said funds by the County Commissioners or City Register." It is contended, on the part of the city, that by this enactment the City Register was constituted a State agent for the disbursement of this fund, and that it was not competent for the Legislature to make the city liable for his default. Now while it may be conceded that the power of the Legislature over public municipal corporations is not in all respects absolute or unlimited, yet we think it was within the scope of such power and control to impose the duty and liability contained in this provision. It is now too well settled by authority to admit of doubt, that the Legislature had the power to pass a Bounty Act like this, appropriating money from the Treasury, for the purpose of relieving the citizens of the State from the burthen of an involuntary draft, and it could have granted permission to the counties and the City of Baltimore to raise money by taxation for that purpose. *Cooley on Cons. Lim.*, 221. This law then in effect is nothing more than an appropriation of various sums of money for the relief, and for the benefit of the people of the several counties and the City of Baltimore respectively. It deals directly with the counties and the city in their corporate and municipal relations, authorizes the money to be drawn by their respective corporate authorities, and designates officers appointed by the Mayor and City Council or elected by the people of the counties as the proper agents to disburse the money in the mode and manner provided, and all this is to be done for the relief and benefit of the people of the city and counties respectively. Why then was it not competent as well as just to impose upon the counties and the city liability for the default of such officers in the

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State vs. Mayor, &c. of Baltimore.

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discharge of this public duty thus required of them? It has been repeatedly decided by this Court that where a statute imposes a duty upon a county or municipal corporation, and provides it with the means, and clothes it with the power to enforce or discharge that duty, liability to any one injured by a neglect to perform or a negligent performance, follows without any express statutory provision to that effect. The cases on this subject are considered and reviewed in *Flynn vs. Canton Co.*, 40 Md., 312. Here liability to the State, is expressly provided by the statute, and we entertain no doubt as to the power of the Legislature to impose it. It is next insisted that by the term "misapplication" as here used, nothing more was intended than to guard against the use of the State's funds for county or city purposes, but this in our opinion, places too narrow a construction upon the language employed, and one not justified by the general tenor and purpose of the Act. This law, as we have shown, very carefully specifies the persons to whom, or for whose benefit, the money was to be disbursed, and we think it very clear that disbursements to parties whose names do not appear on the "Governor's Rolls," or payment to the same person more than once, are *misapplications* within the meaning of the statute, and for the amount of these the city was properly held liable. For that amount alone was the judgment against the city rendered.

For the reasons thus stated we find no error in the rulings of the Superior Court leading to that result, and this disposes of the appeal taken by the city.

2nd. This brings us to the rulings which resulted in the rejection of other amounts claimed by the State. These are made up of payments alleged and purporting to have been made to or for parties whose names are on the lists furnished to the Governor, but for which the State insists no sufficient vouchers have been produced, and the fact of proper payment not otherwise sufficiently proved. The

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State vs. Mayor, &c. of Baltimore.

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principal ground upon which the State founds its claim to recover these sums is the non-production in the instances specified of duly executed and legally sufficient powers of attorney where payments were made to claim agents or other parties than the volunteers themselves. As to this question we agree substantially with the views taken of it by the learned Judge below in his opinion, which appears in the record, and by the City Counsellor in his brief. The Act of 1864 prescribes no particular mode of payment nor does it direct what vouchers therefor shall be taken or preserved. Its only requirement is that the Register "shall keep a record" of his disbursements, and, as we understand the testimony in the case, that was done. A record was kept in which the disbursements were regularly and duly entered when and as they were respectively made. Whether payment should be made to each volunteer in person, or upon his order, and whether such order should be in writing and how evidenced, were all matters entrusted to the discretion of the Register, and his decision thereon, if honestly made, was final. Where duties of this character are devolved upon a public officer, and no particular provision is made in the statute as to how they shall be discharged, his action in the premises, unless impeached for fraud, or manifestly in excess of his authority, must of necessity be conclusive. As said by Judge STORY, in *Allen vs. Blunt*, (3 *Story's C. C. Rep.*, 745,) "It may be laid down as a general rule that where a particular authority is confided to a particular officer, to be exercised by him in his discretion upon an examination of facts of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provision, absolutely conclusive as to the existence of those facts." Here the law in question contemplated the disbursement of large sums of money in small amounts to a very large number of volunteers who, as soon as mustered into service, were liable to be, and were in fact, sent away and

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State vs. Mayor, &c. of Baltimore.

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employed in distant parts of the country. In that case, payments, at least of the five monthly instalments as they respectively fell due, were of necessity made to agents upon orders or under powers of attorney. By a resolution of the Mayor and City Council, adopted in March, 1864, shortly after the passage of this Bounty Act, the Register was authorized to employ an additional clerk for the purpose of aiding him in the discharge of the duty of disbursing this bounty money, and this clerk, together with the Register himself, who made most of the disbursements, and his successor in office who made the rest, all testify to the effect that it was the invariable practice of the Register's office to require proper and sufficient powers of attorney, orders or assignments, and in all cases of doubt to consult the City Counsellor; that such orders or powers of attorney were in all cases before them when disbursements were made thereon, and entries of such disbursements were at once made in the record thereof, and that in no case would any payment have been made without the production and existence of such vouchers. That it is competent for a public officer to prove that according to the invariable practice of his office certain entries made by him as such public officer could only have been made upon the production and filing with him of a certain written instrument, the existence of which was the subject in dispute, seems to have been decided by the Supreme Court in the case of *Bouldin vs. Massie's Heirs*, 7 *Wheat.*, 122. One of the questions in that case was whether an assignment of a land-warrent could be proved by the testimony of the public officer with whom it should have been filed, to the effect that an entry made by himself in the name of the assignee would only have been made upon the production of a proper assignment of the warrant, and in considering that question, Chief Justice MARSHALL says, "It is impossible to read the testimony of the principal surveyor, or to credit it, without believing that an assignment purporting

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State vs. Mayor, &c. of Baltimore.

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to be made by Jonitte to Massie was produced by Massie and deposited in his office. His fixed rule to require the production of an assignment before an entry in the name of the assignee could be permitted, his averment that he never departed from that rule except in a single instance, his clear recollection of the circumstances attending that instance, his admission of entries in the name of Massie as assignee in the life-time of Jonitte, his averment that the assignment was placed in his office and taken out with the plats and certificates of survey by Massie, prove that there must have been such a paper." The testimony of these Registers and of their clerk is quite as strong as that of the surveyor in the case cited, and their testimony is corroborated by that of a large number of witnesses who had dealings with the office and to whom payments were made upon powers of attorney not now produced. It seems to us that this proof is sufficient to establish the fact that vouchers which the Register in good faith decided to be sufficient to authorize payments thereunder, in cases where they have not been produced and are alleged to be lost, once existed. We are also of opinion that the loss of these papers and an unavailing and sufficient search for them in the places where they were kept and where they ought to have been found if in existence, are sufficiently established by the proof in the record, and therefore, that the Court was right in holding that the testimony of these witnesses was admissible to prove the contents of these lost vouchers, and that under the circumstances of this case, their contents are sufficiently proved to justify the exoneration of the city from liability for the payments in dispute made thereunder. From this it follows there was no error in the rulings against the State. This disposes of the State's appeal, and the result is that the judgment must be affirmed.

In thus disposing of the case, we have not overlooked the supplementary Bounty Acts, but find nothing in any



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State vs. Mayor, &c. of Baltimore.

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of them to induce us to modify the views expressed in this opinion. Of course the Register could not be required under the Act of 1867, chap. 167, to produce any different vouchers from those he was required by the Act of 1864 to keep. The disbursements in controversy were all made under the provisions of that Act, and the duty of the Register as well as the liability of the city are governed by its provisions.

By the Act of 1878, chap. 61, it is provided that "upon the reversal or affirmance of the judgment of a Court of law, the Court of Appeals shall award the costs which may have accrued in the Court below, and in the Court of Appeals, in such manner as to the said Court seems right and proper." In pursuance of this authority, we adjudge that all costs that have accrued in the Court below shall be paid by the city, and that three-fourths of the costs that have accrued in this Court shall be paid by the State and one-fourth by the city. In disposing of the costs in this Court, we have considered that both parties have appealed and neither has been successful in reversing the judgment, and have therefore apportioned the costs very nearly in the proportion that the amount recovered by the State bears to the amount she claimed in the Court below.

*Judgment affirmed, with costs  
to be paid as directed in the opinion.*

(Decided 16th July, 1879.)

CHARLES M. DOUGHERTY *vs.* JOHN B. PIET, Surviving partner of MICHAEL KELLY and JOHN B. PIET, lately trading as KELLY, PIET & COMPANY.

*Practice and Pleading in Equity—Effect of Replication, when motion for Injunction is heard upon Bill, answer and replication—Case of application for Injunction refused because of material allegations in the bill being denied in the answer.*

An application for an injunction was heard upon bill, answer and replication. A material allegation in the bill was denied in the answer in terms clearly and unequivocally responsive to the bill. Other facts were mentioned in support of this denial bordering on the verge of new matter. Certain exhibits relied on in the bill were in the answer admitted to have been executed by the firm of which the respondent was the survivor, but on terms and conditions materially different from those alleged in the bill; and the exhibits themselves did not fully sustain the construction placed upon them in the bill. The allegations of the complainant describing an interview between his attorney and the respondent, and certain verbal promises of the respondent to the attorney, were positively denied. On appeal from an order refusing the injunction, it was HELD:

- 1st. That as the answer so far as responsive to the bill was to be taken as true, on the application for the injunction, the replication had no effect and performed no office at that stage of the cause; its real and only effect being to determine the nature and extent of the issue between the parties, and to regulate the *onus* of proof with a view to the final hearing.
- 2nd. That looking to the bill, and the answer as far as responsive to the bill, the order refusing the injunction was properly passed.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

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Dougherty vs. Piet.

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The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*A. C. Trippe* and *S. Teackle Wallis*, for the appellant.

The case comes before the Court upon bill, answer and general replication; and all new matter alleged in the answer in avoidance of the case stated in the bill, as well as the respondent's Exhibits A, B, C and D, introduced in part to support such new matter, must be disregarded at the hearing, as they are unsupported by proof. *Alexander's Chancery Practice*, 115; 2 *Story's Eq. Juris.*, (11th Ed.), sec. 1529, p. 864; *Clark vs. White*, 12 *Peters*, 189 and 190; *Ringgold vs. Ringgold*, 1 *H. & G.*, 81; *Fitzhugh vs. McPherson*, *Adm'r*, 3 *Gill*, 429.

The answer admits the execution of complainant's exhibits A, B, C and D, and the consideration therefor, and in so doing admits the complainant's case. The consideration set forth is legally sufficient to support the contract for indemnity in the bill. *Brandt on Suretyship*, sec. 191, p. 271, and sec. 177; *Neidig, Adm'r vs. Whiteford*, 29 *Md.*, 183; *Citizens' F. M. & L. Insurance Co. vs. Wallis & Thomas, Garn.*, 23 *Md.*, 173; *Harris, et al. vs. Alcock*, 10 *G. & J.*, 226; *Laeber vs. Langhorn*, 45 *Md.*, 483.

The respondent is estopped from denying the consideration for the contract. *Story's Eq.*, 770 a; *Jones vs. Sluby*, 5 *H. & J.*, 372.

The contract fulfils all the requirements needed for a decree of specific performance, and is such an one as has been sustained by this Court in a long and unbroken series of decisions. *Alexander vs. Ghiselin*, 5 *Gill*, 138; *Sullivan vs. Tuck*, 1 *Md. Ch.*, 59; *Triebert vs. Burgess*, 11 *Md.*, 464; *Carson vs. Phelps*, 40 *Md.*, 99; *Mogg vs. Baker*, 3 *M. & W.*, 195; 1 *Leading Cases in Equity*, (4th Am. Ed.) 1108.

The respondent, as surviving partner, is required to carry out the contract of the firm. The sole question is, was this contract to indemnify entered into upon the con-

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Dougherty vs. Piet.

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sideration stated? If so, this Court will decree a specific performance of it, grant the writ of injunction as auxiliary thereto, and compel the respondent to obey its decree, fulfil his contract, and be honest in spite of himself. *Collyer on Part.*, 952 n; *Berry, &c. vs. Harris, &c.*, 22 Md., 40; *Loeschigk vs. Hatfield*, 5 Robt., (N. Y. S. C.), 29; *Peyton vs. Stratton*, 7 Grattan, (Va.), 381; *Loeschigk vs. Addison*, 4 Abb., (N. Y. S. C.), 313; *Bredlaw vs. Savings Bank*, 28 Mo., 186; *Roy vs. Wilas*, 18 Wis., 174.

*Samuel D. Schmucker* and *Thomas M. Lanahan*, for the appellee.

"After a cause is set down on bill, answer and exhibits for hearing, without proof being taken, the complainant cannot file a *replication* without leave of the Court or consent of the defendant." The Court, in such case, will prescribe the terms of such leave. *Warren vs. Twilley*, 10 Md., 39.

The case was simply before the Court on bill and answer, and at that state of the pleadings, the answer is to be taken as true. *Mason vs. Martin*, 4 Md., 124.

"Where an answer comes in *before* the injunction is ordered, and so denies the equity of the bill as to authorize a dissolution of the injunction, on motion to dissolve, the injunction ought *not* to be granted." *Bell vs. Purvis, et al.*, 15 Md., 22; *Estep vs. Watkins*, 1 Bland, 488.

The answer was in at the time of the hearing, and denied the equities of the bill, and its averments must be taken as true. *Dorsey vs. Hagerstown Bank*, 17 Md., 412; *Philadelphia Trust Co. vs. Scott & Barton*, 45 Md., 451; *Webster vs. Hardesty*, 28 Md., 592-6.

The complainant's conduct in extorting from Piet a secret agreement for a preference, is a fraud upon the Registry Acts, and will not be enforced by a Court of equity. "Equity will authorize and enforce an agreement to execute a mortgage only when it can be done consist-

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Dougherty vs. Piet.

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ently with the rights and equities of others." *Nelson vs. The Hagerstown Bank*, 27 Md., 51-73-4; *Cockey vs. Milne's Lessee*, 16 Md., 200-207.

The case of *Nelson vs. Hagerstown Bank* fully recognizes the case of *Alexander vs. Ghiselin*, (5 Gill, 138,) but says it was a case decided "before the Registry Act, requiring an oath to mortgages," &c., &c.

Every application for specific performance rests in the sound discretion of the Court, and is not *ex debito justitiæ*. *Manning vs. Wadsworth*, 4 Md., 59-70; *Smoot vs. Rea, &c.*, 19 Md., 398-405.

BOWIE, J., delivered the opinion of the Court.

The appeal in this case is from an order of the Circuit Court of Baltimore City, refusing the application of the appellant for an injunction. The bill and exhibits were filed on the 18th of March, 1879. On the same day it was ordered by the Court that the application for injunction be set down for hearing on the 21st day of March, 1879; provided, a copy of the order be served on the opposite party, or his solicitor, on or before the 19th day of March, 1879. Service was admitted on the same day.

The appellee filed an answer on the 21st March. On the 28th of March the defendant filed an exception to the entering of a general replication to the answer, as follows: "The defendant excepts to the right of the complainant to file a general replication in this case, at the time of the hearing of the motion for a preliminary injunction, the complainant not having leave of the Court for the same, or the consent of the defendant. This exception is taken during the progress of the argument of the motion."

The Court, on the same day, ordered and adjudged as follows: "The application for an injunction in the above entitled case having come on to be heard on bill, answer

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Dougherty vs. Piet.

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and replication, and the solicitors of the respective parties having been heard in argument, and the pleadings and proceedings in the case having been duly considered, it is by the Court, on this 28th of March, A. D. 1879, ordered that the application in this case for an injunction, be and the same is hereby refused."

The case was heard and decided below, according to the record, upon bill, answer and replication; whether the Court was right in allowing the replication to be filed at that stage of the proceedings, or whether the replication in any manner affected the rights of the parties at the hearing, may be a matter of subsequent consideration. It is the established practice in this State that, when an answer comes in before the injunction is ordered, and denies the equity of the bill in such manner, as would authorize a dissolution on motion to dissolve, the injunction in such case ought not to be granted. *Bell vs. Purvis*, 15 Md., 22.

Another rule equally elementary is, that when the injunction is set down for hearing on bill and answer, or on a motion to dissolve, the answer is regarded and taken for true, so far as the same is responsive to the bill, but new matter set up by way of avoidance does not avail. 10 *Gill & Johns.*, 317; *Webster vs. Hardesty*, 28 Md., 592.

The object of the bill was to enforce the specific performance of an agreement alleged to have been made by the firm of Kelly, Piet & Co. to give the appellant security out of their assets, sufficient to indemnify the appellant for certain liabilities incurred on their account, and for their exclusive benefit, in consideration of such promise of indemnity, and to obtain an ancillary injunction. Without encumbering this opinion with unnecessary details, the bill alleges substantially that prior to the 14th of November, 1878, the complainant, together with Mary Kelly, became the drawer of certain accommodation notes of large amounts, payable to the order of Kelly, Piet & Co., "without benefit to himself or consid-

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Dougherty vs. Piet.

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eration therefor, and for the sole benefit of said Kelly, Piet & Co.," which notes were so drawn by the complainant "upon the express stipulation and agreement that the said Kelly, Piet & Co. would at any time, on the request of the complainant, give him security out of their assets sufficient for his liabilities thereupon."

It is further alleged that about the 14th of November, 1878, Kelly, Piet & Co., to procure further accommodation, and induce him to continue his former, applied to him for that purpose, and the complainant being unwilling and having refused said request, without further security, they agreed and promised to give the complainant a preference over all others, their creditors, for his protection against liability, as well upon the notes hitherto drawn by him for their benefit, as upon the renewals to be made of the same, upon the additional accommodation asked for, and accordingly offered to give and did give the complainant for that purpose, on the 14th of November, 1878, an order to enter judgment in the complainant's favor at any time for \$12,500, and at the same time executed an agreement to appoint the complainant's trustee for the liquidation of the firm's business, in case of any subsequent necessity therefor, and also appointing him, in case of the decease of either of the partners, to represent the decedent in the settlement of the same, and to manage the same, as will appear by Exhibits A, B, C.

Exhibit A is a *narr.*, in common form, in an action on the case by Charles M. Dougherty against Michael J. Kelly and John B. Piet, trading as Kelly, Piet & Co., for money payable by defendants to plaintiff, including the common counts, and claiming \$30,000 damages.

Exhibit B is a titling in the case of *Charles M. Dougherty vs. Michael J. Kelly, John B. Piet*, trading as Kelly, Piet & Co., in the Superior Court of Baltimore City, underwritten as follows:

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Dougherty vs. Piet.

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"Mr. ———, please enter your appearance for us in this case, and confess judgment in the sum of twelve thousand five hundred dollars."

(Signed,)

M. J. Kelly,  
John B. Piet,  
Kelly, Piet & Co.

Exhibit C: BALTIMORE, November 14th, 1878.

"In consideration of the loans and advances in money, made to the firm of Kelly, Piet & Co. by Charles M. Dougherty, and the extension of the time of payment of the same, we, Michael J. Kelly and John B. Piet, individually, and as composing said firm of Kelly, Piet and Company, do covenant and agree with the said Charles M. Dougherty, to appoint him, the said Charles M. Dougherty, trustee of our partnership stock and assets, to manage the same in liquidation, in case of any state of affairs arising in the opinion of either member of said firm, making the appointment of a trustee in liquidation advisable; and in case of the death of either member of said firm, we and each of us do now constitute, authorize and empower the said Charles M. Dougherty to represent *the interest of the partner so deceased, in the settlement of the business of the partnership and to manage the same.*

(Signed,)

M. J. Kelly,  
John B. Piet.  
Kelly, Piet & Co."

It is further alleged that the firm of Kelly, Piet & Co. exhibited to the complainant a statement of the condition of the firm, showing its available assets exceeded its liabilities, besides other resources not included in the assets, which would liquidate \$10,000 of their indebtedness; relying upon which, he allowed his accommodation notes previously executed to stand, and gave new notes, for the benefit of said firm of large amounts, some of which have been



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Dougherty vs. Piet.

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paid, and others secured to be paid by him. Further charging, the complainant says, that relying on the statements and assurances aforesaid, he did not procure a judgment to be entered against the said Kelly, Piet & Co.

That shortly afterwards, about the 7th of January, 1879, Michael J. Kelly being ill of a disease of which, in a few days after he died, and the complainant being absent from the State, his attorney sent for John B. Piet, and informed him it was necessary for his client's interest and for his protection, the said judgment should be put upon record. Whereupon the said Piet assured the complainant's attorney the firm was perfectly solvent, that to put such judgment on record would injure the credit of the firm and ruin him, and entreated his attorney not to do so, etc. That said Piet promised, if the judgment was not put on record, in the event of M. J. Kelly's death, he would secure the complainant a preference in payment of all loss that might accrue by virtue of the accommodation paper, and would make an assignment of all their partnership effects to him, with a preference securing all liability on account of said accommodation paper, etc.

The bill further charges, that since the death of Kelly, it has been ascertained that the statement of the partnership affairs was illusory and deceptive, and that the firm is insolvent, and unable to meet the payment of the notes referred to; that the respondent, Piet, although requested, has refused to execute the deed of assignment, or to give him a preference as promised, and still refuses; that he seeks to acquire the business to himself, at the expense of his creditors, and denies the complainant all relief. The bill prays specific performance of the contract, for security. and an injunction preventing the said partner Piet from disposing of the assets in the meantime, or intermeddling with the affairs of the partnership.

The respondent's answer, admitting the existence of the accommodation notes drawn by complainant prior to the

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Dougherty vs. Piet.

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14th of November, 1878, and those subsequent thereto, denies that said notes were drawn upon the express agreement and understanding, as in the bill alleged, that the firm would at any time, upon request of complainant, give him security out of their assets sufficient for his liability.

This material fact is denied *in limine*, in terms clearly and unequivocally responsive to the bill. Other facts are mentioned in support of this denial which may border on the verge of new matter. Exhibits A, B and C are admitted to have been executed by the firm, but on terms and conditions materially different from those alleged in the bill.

Whilst these exhibits, particularly A and B, which are without date, support the theory of the complainant's bill, inasmuch as they show a purpose on the part of the firm of Kelly, Piet & Co. to give security by confessing judgment; yet the forbearance on the part of the complainant's attorney, to record the judgment, is inconsistent with the theory that his principal required absolute unconditional security, before he would renew or extend his accommodation. Exhibit C, which bears date November 14th, 1878, and is referred to in support of the complainant's allegation of a contract for security upon accommodation notes, contains no reference to notes past or future, but is made, "in consideration of the loans and advances in money made to the firm of Kelly, Piet & Company, by Charles M. Dougherty, and the extension of the time of payment of the same." The obligation assumed is entirely contingent, viz., to appoint him, Charles M. Dougherty, trustee, etc., to manage the same in liquidation, in case of any state of affairs arising, *in the opinion of either member of the firm*, making the appointment advisable. In other words, if either of the firm thought proper, they would make the complainant trustee; "and in case of the death

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Dougherty vs. Piet.

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of either, they would constitute Charles M. Dougherty to represent the interest of the partner so deceased, in the settlement of the business of said partnership and to manage the same.

What connection exists between this paper and the renewal of accommodation paper, if any, is not apparent on its face.

How Mr. Dougherty is to be secured by a promise of an appointment which was entirely optional with the promisors, or protected by becoming a representative of a deceased partner, is not so obvious as to make such a promise equivalent to security.

The paper itself implies a confidence between the parties entirely at war with the demands of an exacting creditor, requiring indemnity for the past and security for the future.

Exhibit D, referred to by complainant as embodying "an agreement of preference and undertaking to execute a deed of assignment," taken alone, contains no consideration for a promise, or actual promise or agreement, but expresses a willingness, as surviving partner, to assign their whole business to Mr. Dougherty and give him preference, etc.

The allegations of the complainant, describing the interview between his attorney and the respondent, and the verbal promises of respondent to the attorney, in consideration of forbearance to record the judgment, are positively denied.

As the answer, so far as responsive to the bill, was to be taken as true, on the application for the injunction, the replication had no effect, and performed no office whatever at that stage of the cause; its real and only office being to determine the nature and extent of the issue between the parties, and to regulate the *onus* of proof with a view to the final hearing.

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Mayor, &c. of Balto. vs. Stoll.

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Confining our view entirely to the bill, and answer as far as responsive to the bill, we think the order appealed from should be affirmed.

*Order affirmed, and  
cause remanded.*

(Decided 16th July, 1879.)

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THE MAYOR AND CITY COUNCIL OF BALTIMORE vs.  
DANIEL STOLL.

*Validity of the Act of 1878, ch. 159, considered, with reference to the Sufficiency of its Title, and its Interference with the rights of Navigation—Question whether the Levy by the City of Baltimore of a sum to pay for the Bridge therein provided for, was Mandatory or Directory only—Case of Mandamus prematurely brought.*

The title of the Act of 1878, ch. 159, is "An Act to repeal ch. 220 of the Acts of 1876, entitled an Act to establish a free bridge over the Patapsco river at or near the present site of Light street Bridge, \* \* \* and to enact the following in lieu thereof." By this Act the Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, are "authorized, empowered and directed" to purchase the present bridge over the Patapsco river, known as Light street Bridge, and keep the same as a free bridge, if the owners will on or before the first day of January, 1879, agree to sell the same unto the said Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, at a price and upon such terms as to them may appear fair and reasonable. The Act further authorizes, empowers and directs them, if they cannot buy the said bridge to build a free bridge over said river, provided the whole cost "shall not exceed in the aggregate the sum of forty thousand dollars;" and provides for a keeper for opening and closing the draw, but makes no provision respecting the size or extent of the draw. By the 4th sec. the said Mayor and City Council, and the County Commissioners of Anne

Mayor, &c. of Balto. vs. Stoll.

Arundel County are "authorized and directed," to levy on the assessable property of the city and county respectively, "at such time or times as they may deem best, such sums of money as may be necessary to carry out and secure the provisions of this Act, the expense thereof to be borne equally by said city and county, a portion thereof at least to be levied at their regular annual levy for the present year." On a mandamus filed in September, 1878, asking that said Mayor and City Council "may be compelled to levy a portion of the costs of carrying out the provisions of said Act, in accordance with the provisions of the said Act," it was HELD:

- 1st. That the title of said Act was not defective under sec. 29 of Art. 3 of the Constitution.
- 2nd. That the direction as to the time within which or at which the first portion of the levy was to be made, was so far directory only that the defendant was not under compulsion to levy until after the exhaustion of efforts to buy within the period mentioned, and it was known whether it could buy or build within the sum designated by the Act.
- 3rd. That the proceeding was premature, and no mandamus should be awarded until it should appear, after the first day of January, 1879, that the defendant was wilfully disregarding the requirements of the Act of Assembly.
- 4th. That although the Act of Assembly, while it provides for a draw to the bridge, does not designate its size, it will not be held to have intended the construction of a bridge without a sufficient draw for the conveniences of navigation; and the said Act cannot be held void because of its interference with the rights of navigation.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*James L. McLane, City Counsellor, and S. Teackle Wallis, for the appellant.*

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Mayor, &c. of Balto. vs. Stoll.

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*Isidor Rayner and T. A. Linthicum, for the appellee.*

IRVING, J., delivered the opinion of the Court.

This is an appeal from a *pro forma* order of the Superior Court of Baltimore City, directing a mandamus to issue against the appellant to compel the performance of certain supposed duties under the Act of 1878, ch. 159. The title of the Act is, "An Act to repeal ch. 220 of the Acts of 1876, entitled an Act to establish a free bridge over the Patapsco river, at or near the present site of Light street bridge, \* \* \* and to enact the following in lieu thereof:" By the first section of the Act, the Mayor and City Council of Baltimore and the County Commissioners of Anne Arundel County are "authorized, empowered and directed" to purchase the bridge over the Patapsco river, known as "Light street bridge," and to keep the same as a free bridge, if the owners will, on or before the first day of January, 1879, agree to sell the same unto the said Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, at a price, and on such terms and conditions as to them may appear fair and reasonable. By the second section they are "authorized, empowered and directed," if they cannot buy the said bridge, to build a free bridge over said river, from some suitable point on the Anne Arundel shore to some convenient and practicable point in Baltimore City; and provides for the condemnation or purchase of necessary lands and material for its construction; provided the whole cost "shall not exceed in the aggregate the sum of forty thousand dollars." The third section provides for a keeper for opening and closing the draw, but makes no provision respecting the size or extent of the draw. By the fourth section the said Mayor and City Council, and the County Commissioners of Anne Arundel are "authorized and directed" to levy on the assessable property of the city and county respectively "at such time or times as they may

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Mayor, &c. of Balto. vs. Stoll.

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deem best, such sums of money as may be necessary to carry out and secure the provisions of this Act, the expense thereof to be borne equally by said city and county, a portion thereof at least to be levied at their regular annual levy for the present year." The fifth section provides for maintaining the bridge when purchased or built. The special prayer of the petition for *mandamus* is that the Mayor and City Council of Baltimore may be compelled to levy a portion of the costs of carrying out the provisions of said Act in accordance with the provisions of the said Act. The appellants by their answer set up that the Act is invalid, because its title is defective under the Constitution of the State, and also because it is invasive of the public rights of navigation. They also claim that the section of the Act sought to be enforced by *mandamus* is directory only, and not mandatory in its character. They admit that when the *mandamus* was issued, the annual levy had been made, and was in process of collection; and that it included no levy for the purposes of said Act. The appellee demurred, and the demurrer being sustained, and the order for the *mandamus* having passed, an appeal was taken to this Court. The only question before us, therefore is, was the *mandamus* properly ordered? or should the demurrer have been overruled?

This Court has so often passed upon the question involved in the appellant's objection to the said Act of 1878, by reason of infirmity of title under section 29, Art. 3, of the State Constitution, that it is unnecessary to say more than that the objection is fully covered by the decision of the Court in the case of the *County Commissioners of Talbot County vs. The County Commissioners of Queen Anne's County*, 50 Md., 245. The title of the Act therein decided upon, and the one herein considered, are so nearly identical in form, that it is impossible to see good reason for holding this one unconstitutional and that one free from objection.

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Mayor, &c. of Balto. vs. Stoll.

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The only thing the petition for the mandamus prays for, is to compel the respondents to levy some portion of the cost of the contemplated work or purchase, at their annual levy for 1878. The prayer is to compel something to be done which, when the petition was filed, could not be done at the time, and in the manner prescribed by the Act, if the Act, in that respect, is to be regarded as compulsory; for it is conceded in the pleadings that the levy was made and taxes sent out for collection. The appellants insist that the Act, in that particular, is not mandatory, but directory only, and so regarding it, no levy was made in 1878.

A discretion to some extent was confided in the appellants in other parts of the Act, so that it could not be regarded as wholly mandatory without any qualification. They were not to buy the existing bridge unless they and the owners could agree, and the owners would accept a price which they *thought reasonable*. Failing to buy the existing bridge, they were to build a new one, to cost not more than forty thousand dollars. Whether one could be built for that sum was a fact to be ascertained by them, and their action was to be restrained, of course, if the work could not be done for that sum. In the section prescribing a levy, their discretion as to time, &c., is expressly provided for, and the suggestion made that a *portion* of the cost is to be levied at their first levy. We call it a suggestion, because, looking at the whole law, we do not think the Legislature could have intended it to be more than directory. The proportion of cost is left entirely with the appellants—a *portion only* is named. If that provision was mandatory, the contingencies, which might render the levy wholly useless, could not modify their duty in the premises, whereas if it was directory merely, it would be competent for the appellants to be governed by the circumstances. This view is strengthened by the fact that the appellants and the owners of the bridge were allowed till January 1st, 1879, for their negotiations. The bridge



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Mayor, &c. of Balto. *vs.* Stoll.

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was to be bought if it could be purchased for a price, in the appellants' judgment, reasonable and fair; and they were allowed till that time to ascertain if it could be done. Until that time came it could not be known what amount would be wanted, or if any would be wanted, if the forty thousand dollars had been found insufficient for building a new bridge. The whole provisions of the law must be construed together. The language employed must be construed with reference to the subject legislated on, and object to be secured. One provision must be construed by another according as the one or the other is the chief object to be attained. The section we are considering only provided for raising the means for carrying out the main object, viz., the buying the old or the building a new bridge for a specified sum. If the specified sum would not do either, no levy was needful. If there were contingencies, therefore, which might make the main object impossible of attainment, it is reasonable to suppose the Legislature did not mean, in that event, any levy should be made. Such possibility throws light on what ought to be the construction of the directions given. We think therefore the provision in controversy was only directory, and not mandatory. It was supposed, no doubt, that all the information necessary, and all negotiations for the purchase would be had before the time for the levy came, and therefore the language giving rise to this controversy was used—"In respect to the time within which a duty prescribed by a statute is directed to be performed, Courts have adopted as a general rule of construction, that the *time* is to be regarded as directory merely, unless, from the nature of the act to be performed, or the language employed in the statute, it plainly appears that the designation of time was intended as a limitation of power of the officer." *Webster's Appeal*, 29 Md., 522. From what we have already said it is clear that we do not think the nature of the act to be performed indicates a limitation of power of the ap-

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Mayor, &c. of Balto. *vs.* Stoll.

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pellants. We therefore think that the direction as to the time within which or at which the first portion of the levy was to be made, was so far directory only, that the appellants were not under compulsion to levy until after the exhaustion of efforts to buy within the period mentioned, and it was known whether they could buy or build within the sum designated by the Act. In other words, we think this proceeding was premature, and that mandamus should not have been awarded until it should appear, after the first day of January, 1879, that the appellants were wilfully disregarding the requirements of the Act of Assembly. Notwithstanding the demurrer admits that a bridge will interfere with navigation at that place, it does not follow that the Act of Assembly has authorized the construction of such a bridge as would so interfere with navigation as not to be lawful. It is true the Act does not designate the size of the draw, but it provides for a draw; and it will not be held to have intended the construction of a bridge without sufficient draw for the convenience of navigation. By previous legislation respecting the existing bridge mentioned in the Act under consideration, the Legislature has indicated its judgment respecting the needs of the public in that regard, and its directions in that particular would form a good criterion for the appellants in executing the provisions of this Act. When an Act is not necessarily void on its face, all intendments will be made to support it. We cannot therefore declare this Act void, as we are asked to do, because of its interference with the rights of navigation. In our view it does not necessarily authorize the obstruction of navigation. But for the reasons already indicated, we think there was error in granting the mandamus when prayed for, and the order will be reversed.

*Order reversed, with costs.*

(Decided 16th July, 1879.)

THE MAYOR AND CITY COUNCIL OF BALTIMORE, and  
JOHN E. A. CUNNINGHAM vs. JEREMIAH WEATHERBY, and others.

*Practice in regard to Appeals in Injunction cases—Effect of a Demurrer as giving the right to Appeal under Art. 5, sec. 21, of the Code—Case of an Injunction improperly granted by reason of the Non-production of copies of documents referred to in the Bill—Construction of Ordinance of the City of Baltimore, of 1873, No. 64—Powers of the Mayor and City Council of Baltimore, and the Board of Commissioners of Public Schools, in regard to contracts for Supplies for the Public Schools.*

Sec. 21 of Art. 5 of the Code, provides, that an appeal may be allowed "from any order granting an injunction, or from a refusal to dissolve the same, or an order appointing a receiver, the answer of the party appealing being first filed in the cause." **Held:**

That a demurrer to the whole bill may be taken as an answer for the purpose of the appeal.

The allegations of the bill, and the relief sought had reference to, and were based upon what was charged to be the illegality of the acceptance of a certain proposal by the Board of Commissioners of Public Schools in the City of Baltimore, or a certain committee of that Board, made to them by C. one of the defendants; the illegality in the contract entered into between C. and the Board of Commissioners of Public Schools; and the bond taken by the latter from the former for the due performance of the contract; the object of the bill being to have the execution of the contract restrained, and the whole transaction declared void as being in violation of the ordinances of the city. All the documents charged to be void were of a public nature, and accessible to the complainants as to any other person interested in them, and yet copies of them had not been exhibited with the bill, nor was there any reason assigned for the omission to exhibit them. **Held:**

That for the Court to declare all said documents illegal, or to act upon the assumption of their invalidity, upon the mere allegation

Mayor, &c. of Balto. vs. Weatherby, et al.

of the bill, without an opportunity of inspecting them, would be a most dangerous proceeding, and as such ought not to be sanctioned.

The bill charged that the Board of School Commissioners had advertised for sealed proposals for supplying one of the public schools with suitable heating apparatus, and, without laying said proposals (which included one made by the complainants,) before the Mayor, had placed them in the hands of a committee of said Board, who opened said proposals and awarded the contract to C. And this action of the Board was claimed to be illegal as in violation of Ordinance No. 64 of 1873. By that ordinance when city officers shall advertise for sealed proposals for any public work or contract, "*pursuant to existing ordinance or resolution*," it is made the duty of such officer to lay the proposals received before the Mayor, who, with the Comptroller and Register, shall proceed to open them, and award in all cases to the lowest bidder of known capacity, responsibility, &c. **HELD:**

1st. That if there was no ordinance in existence at the time of the transaction in question requiring the Board of Commissioners of Public Schools to advertise for sealed proposals, such as those made by C. and the complainants, then there was no ground for the injunction.

2nd. That the subject-matter of the transaction impeached, was within the power and control of the Mayor and City Council, (Act of 1872, ch. 357, sub-ch. 16,) and even if it were conceded, that the ordinances in force at the time did not confer authority on the Commissioners of Public Schools to make the contract in question, still the injunction should not have gone against the Mayor and City Council.

3rd. That the whole subject-matter being completely within their control, in the absence of any legislative formality required, it was perfectly competent to them to have authorized or sanctioned the contract without a previous ordinance prescribing the formalities, and the agencies through and by which such contract could be made.

**APPEAL** from the Circuit Court of Baltimore City.

The bill in this case was filed by the appellants against the appellees and the Board of Commissioners of Public Schools of Baltimore City, and others, for the purpose of having the contract therein referred to declared illegal, and for an injunction to prevent its being carried out.

Mayor, &c. of Balto. vs. Weatherby, et al.

The bill, after referring to the ordinance of 1873, No. 64, the nature of which is sufficiently set forth in the opinion of the Court, makes the following allegations in regard to said contract:

"That on the 8th day of October, 1878, the said Board of Public School Commissioners caused to be inserted in two of the daily papers of said city, the advertisement, of which the following is a copy, viz.,

"OFFICE COMMISSIONERS OF PUBLIC SCHOOLS,  
"Baltimore, October 7th, 1878.

"Sealed proposals for supplying Male and Female Colored Schools, No. 7, with suitable heating apparatus, will be received at this office until Thursday, 10th instant, at 12 m.

"Specifications at this office.

"H. M. COWLES,  
"Secretary."

"That the schools referred to in said advertisement are among the public schools of said city, and that the school building which it was proposed to heat is one of the school buildings of said city, and is situated on the north side of Waesche street, near Fremont street, and that Henry M. Cowles, whose name is signed to said advertisement, is the secretary of said Board.

"That in pursuance of said advertisement, sealed proposals were sent in by the firm of J. Weatherby & Sons, (which firm is composed of your complainants,) to supply the heating apparatus called for, at the several prices of \$995.00, \$1225.00 and \$1340.00, according to the number and style of furnaces proposed, and also by a certain John E. A. Cunningham, at the prices of \$1250.00 and \$1489.00.

"That in violation of the provisions of the ordinance above referred to, the said secretary did not lay said sealed

Mayor, &c. of Balto. *vs.* Weatherby, *et al.*

proposals before said Mayor, but placed them in the hands of a certain committee of said Board, composed of said George L. Hamel, John T. Morris, John L. Lawton, Goldsborough S. Griffith, H. B. Roemer and James W. Denny, six of its members, which said committee unlawfully claimed authority to open said sealed proposals, and to award the contract thereunder, and that said committee, although having no authority to do so, and moreover, without their having been in said advertisement any time or place designated, at which said proposals would be opened, did open said sealed proposals, and undertake to award the contract for said heating apparatus, and did pretend to award said contract to the said John E. A. Cunningham, whose bid for the same number and class of furnaces was higher than was that of the said J. Weatherby & Sons, which latter bid also in every other requirement of the ordinances of the said Mayor and City Council.

“ And your complainants further show, that in pursuance of said pretended award, the said committee of six undertook to make the said Mayor and City Council a party to a contract with said Cunningham in the premises and took from said Cunningham a bond, pretending to be for the performance of said contract thus entered into, in violation of said ordinances; the penalty in which bond and the sufficiency of the security therein, the said committee of six undertook to determine, and which said bond was not taken by the City Register, nor was the penalty therein determined by him, nor was said bond certified by the Comptroller to be good and sufficient, nor was the said bond approved by the Mayor.

“ Your complainants are advised and charge, that all the said proceedings of said committee are illegal and in direct violation of the ordinances of said Mayor and City Council; that the collective body of Commissioners of Public Schools have no such authority, and that they have no power to spend money or contract in the name of the said

*Mayor, &c. of Balto. vs. Weatherby, et al.*

Mayor and City Council for such purpose, and that much less has a mere committee of said Board any authority to open sealed proposals, make awards of contract, take bonds of contractors, and make the Mayor and City Council of Baltimore a party to contracts, involving the expenditure of a large sum of money, and that under such pretended contract and bond there is no sufficient security for the performance of the undertakings of said Cunningham in the premises, and not that security which said ordinances and the interests of the tax-payers of said city require from contractors engaged in the performance of public work; and your complainants are advised and charge, that any payments of money under said pretended contract would be in violation of law and misapplication of the public money of the said Mayor and City Council, and be an injury to your complainants as tax-payers.

"That nevertheless, the said Board of Public School Commissioners and the said committee of six, are causing to be prosecuted the work under said pretended contract, and the said Cunningham is prosecuting the same, and the said John T. Morris, who is president of the said Board, as such president, intends, and is about to draw an order on the register of the city, requiring him to pay to said Cunningham the sum of money named in said pretended contract, and the said Henry M. Cowles, secretary, is about to countersign the same, and said register, John A. Robb, intends, and is about to pay the same; which said order and payment, your complainants aver, would be unwarranted by law, in violation of said ordinances and illegal."

The rest of the case is sufficiently stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*John P. Poe and Thomas W. Hall, City Solicitor, for the appellants.*

Mayor, &c. of Balto. *vs.* Weatherby, *et al.*

*Albert Ritchie*, for the appellees.

ALVEY, J., delivered the opinion of the Court.

The present is a joint appeal by all the defendants from an order granting an injunction. But one of the defendants, Cunningham, has filed an answer responsive to the facts alleged, and the other defendants have filed a demurrer, assigning causes against the sufficiency of the bill. The complainants have made a motion to dismiss the appeal, upon the ground that all the defendants joining in the appeal have not answered, as required by sec. 21, of Art. 5, of the Code, as preliminary to the right of appeal. This motion, we think, ought not to prevail.

The section of the Code just referred to provides that an appeal may be allowed "from any order granting an injunction, or from a refusal to dissolve the same, or an order appointing a receiver, the answer of the party appealing being first filed in the cause." This is substantially the provision that was contained in the 3rd sec. of the Act of 1835, ch. 380, from which the 21st sec. of the 5th Art. of the Code was taken, so far as the right of appeal from orders granting or refusing to dissolve injunctions is concerned. It has been repeatedly decided, upon the construction of the 3rd sec. of the Act of 1835, that any defendant who had answered the bill for an injunction, might appeal from the order granting or refusing to dissolve the injunction, without waiting for the answer of his co-defendants. *Barnes, et al. vs. Dodge*, 7 Gill, 109; *Alexander vs. Worthington*, 5 Md., 471. The same right exists under the 21st sec. of the 5th Art. of the Code.

But the question here is, whether a demurrer can be treated as an answer, and therefore embraced within the meaning and purview of the statute, so as to enable those filing the demurrer to join in the appeal? And upon careful consideration this Court is of opinion that the demurrer, being to the whole bill, may be taken as an



Mayor, &c. of Balto. vs. Weatherby, et al.

answer for the purposes of the appeal. It is an answer in law, though not responsive to the facts charged in the bill. It was taken in the sense of an answer in the case of *New Jersey vs. New York*, 6 *Pet.*, 323, and we think it may be taken in that sense here. If, instead of filing the demurrer, the defendants had put in an answer, regularly denominated such, expressly admitting all the facts charged, but denying the right to the relief prayed, such an answer would have been in effect a demurrer, and yet it would certainly have gratified the requirement of the statute. In all cases where any ground of defence is apparent on the face of the bill itself, either from matter contained in it, or from defects in the frame of it, or in the case made by it, the proper mode of defence is by demurrer; and as it may be the means of preventing an useless and protracted litigation, as well as ruinous expense to the parties, it cannot be reasonably supposed that the Legislature designed to cut off this mode of defence to the bill. Besides, the requirement of the statute in respect to the filing the answer being in the nature of a restriction upon the right of appeal, it should be liberally construed in favor of the right; and especially should it be so construed when no apparent good is to be accomplished by a rigid or technical construction.

To the objection that the statutory requirement may be evaded by the resort to frivolous demurrers, it may be replied that such an abuse is not more likely to occur in regard to the use of demurrers than in regard to the ordinary mode of answering, especially where the answer may be put in without oath. By settled practice, demurrers are required to be signed by counsel, as an assurance to the Court that they are not, in the opinion of the counsel at least, frivolous, and that such a mode of defence is taken in good faith. Besides this, by sec. 102 of Art. 16 of the Code, if the demurrer be overruled, or withdrawn without leave of the Court, the party putting in the demurrer is

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Mayor, &c. of Balto. vs. Weatherby, et al.

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required to pay to the opposite party ten dollars, and all costs accrued by reason of the demurrer, and to stand in contempt until such sums are paid.

In the case of the *Mayor, &c. of Baltimore vs. Gill*, 31 Md., 375, the appeal was from an order granting an injunction, and there was no other answer put in than a demurrer to the bill. The Court below had overruled the demurrer, but that was only an interlocutory order from which no appeal could be taken, (3 *Gill*, 138, 152; *Code*, Art. 5, secs. 22, 24,) and the Court had not proceeded to final decree on the bill. It was the right of the defendants to stand on the demurrer, (*Alex. Ch. Prac.*, 59,) and the appeal was taken from the order granting the injunction, and on that appeal the case was heard in this Court. It is true, no question was made here in regard to the right of appeal; but we must suppose that the able and experienced counsel engaged in the case well understood that, as the right of appeal in such case was purely a statutory right, there was no power or jurisdiction in this Court to review the order appealed from, unless the requirements of the statute, conditional to the right of appeal, had been complied with. We entertain no doubt but that that case was properly before the Court, and we think this is properly here also, on the joint appeal of all the defendants.

The appeal being properly before us, we have no difficulty in saying that the bill does not present a proper case for an injunction. The allegations of the bill and the relief sought have reference to and are based upon what is charged to be the illegality in the acceptance of a certain proposal by the Board of Commissioners of Public Schools, or a certain committee of that Board, made to them by Cunningham, one of the defendants; the illegality in the contract entered into between Cunningham and the Board of Commissioners of Public Schools, and the bond taken by the latter from the former for the due performance of the contract; the object of the bill being to have the exe-

Mayor, &c. of Balto. vs. Weatherby, *et al.*

cution of the contract restrained, and the whole transaction declared void, as being in violation of the ordinances of the city. All these documents charged to be void are of a public nature, and are accessible to the complainants as to any other person interested in them, and yet copies of them have not been exhibited with the bill, nor is there any reason assigned for the omission to exhibit them. That the Court should be required to declare all those documents illegal, or to act upon the assumption of their invalidity, upon the mere allegation of the bill, without an opportunity of inspecting them, would certainly be a most dangerous proceeding, and such as ought not to be sanctioned. It is not for the parties to allege their construction of a written document, or the effect of it, or whether it has been executed legally and with all the formalities required by law, or whether it be of a character prohibited by law or ordinance, and require the Court to accept their allegations as true; the document itself should be produced, and as far as it furnishes evidence upon the subject-matter complained of, it should be allowed to speak for itself, and the Court draw its own conclusions. This is what both the reason of the thing and the established practice require, and there is no reason here for a departure from established practice. *Nusbaum vs. Stein*, 12 Md., 315; *Hankey vs. Abrahams*, 28 Md., 588; *Shoemaker vs. Mechanics' Bank*, 31 Md., 396.

Then, again, it is not alleged and shown that there was any existing ordinance or resolution of the City Council requiring the Board of Commissioners of Public Schools to advertise for sealed proposals for furnishing supplies, or heating apparatus for school houses; and unless there was such ordinance or resolution, then in existence, the transaction complained of would clearly not be embraced within the terms of the ordinance set out in the bill, being Ordinance No. 64, of 1873. We have been referred to no ordinance containing such requirement, and

Mayor, &c. of Balto. *vs.* Weatherby, *et al.*

we have not been able to find any such. By the terms of Ordinance No. 64, of 1873, it is only when city officers shall advertise for sealed proposals for any public work or contract, "*pursuant to existing ordinance or resolution,*" that it is made the duty of such officer to lay the proposals received before the Mayor, who, with the Comptroller and Register, shall proceed to open them, and award, in all cases, to the lowest bidder of known capacity, responsibility, etc. If there was no ordinance in existence at the time of the transaction in question requiring the Board of Commissioners of Public Schools to advertise for sealed proposals, such as those made by Cunningham and the complainants, then, according to the allegations and theory of the bill, there was no ground for the injunction. Moreover, the subject-matter of the transaction impeached was clearly within the power and control of the Mayor and City Council, (*Act 1872, c. 377, sub-ch., 16*); and if it were conceded, as contended by the complainants, that the ordinances in force at the time did not confer authority on the Commissioners of Public Schools to make the contract in question, (a proposition that we by no means decide,) still, the injunction should not have gone against the Mayor and City Council. The whole subject-matter being completely within their control, in the absence of any legislative formality required, it was perfectly competent to them to have authorized or sanctioned the contract, without a previous ordinance prescribing the formalities and the agency through and by which such contract could be made. This being clearly the power of the Mayor and City Council it ought not to be interfered with or its exercise restrained. *Fanning vs. Gregoire*, 16 *How.*, 524, 533.

The order appealed from will be reversed, and the cause remanded to the Court below, with costs to the appellants.

*Order reversed, and  
cause remanded.*

(Decided 16th July, 1879.)

THE GARDENVILLE PERMANENT LOAN ASSOCIATION  
vs. MARIA S. WALKER.

*Construction of a Will creating a Charge upon Land for the Support and maintenance of Testator's Widow—The charge Enforceable in Equity—Liability of the land therefor in the hands of a Grantee of the Devisee—Subrogation—How the Allowance to be Estimated.*

A testator devised to his son the farm on which the testator dwelt "upon condition that if my wife, M. L. W., should survive me, that he, my said son shall keep, provide for and support her during her natural life, and allow her to dwell and reside on said property with him and his family, free of expense during her life time." On a bill filed by M. L. W., against the son and his grantee, it was HELD:

- 1st. That by said will the farm was charged with the burden of a reasonable support and maintenance of the complainant during her life.
- 2nd. That the purchaser of the land from the son took the same subject to this charge.
- 3rd. That the complainant being justified in leaving the house of her son, and seeking a home elsewhere, for the reason that he failed to provide her with reasonable and necessary support and maintenance, while she remained a member of his family, such as she was entitled to enjoy under the will, she was entitled to maintain her bill for the enforcement of the charge for her reasonable maintenance and support against the land in the hands of the grantee of the son.

At the time of the testator's death the land was subject to a mortgage, which the son paid with money borrowed from the G. P. L. Association. The old mortgage was released and a new mortgage was made to the G. P. L. Association to secure its said loan. Under a foreclosure of the latter mortgage, the mortgagee became the purchaser of the property. HELD:

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Gardenville Permanent Loan Assoc'n *vs.* Walker.

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That the G. P. L. Association was not entitled by subrogation to the benefit of the old mortgage for the purpose of diminishing the charge of the complainant against the land; but that it would be so entitled if instead of a release it had taken an assignment of said mortgage.

It appearing that the rental value of the property was \$175, it was  
HELD:

1st. That the complainant was not entitled to the whole of this sum, but that the taxes and necessary repairs ought first to be paid out of the rent, and the allowance to her, even if it embraced the whole rental value of the land, would have to be abated to that extent.

2nd. That \$150 per annum looking to the net rental value of the land, was a fair, just and reasonable allowance, and that the arrearages ought to be estimated on that basis.

APPEAL from the Circuit Court for Baltimore County, in Equity.

John Frederick Walker devised his farm, on which he dwelt in Baltimore County, containing about ten acres, to his son, John Frederick Walker, Jr., "upon condition that if my wife, Maria Leonora Walker, should survive me, that he, my said son, shall keep, provide for and support her during her natural life, and allow her to dwell and reside on said property with him and his family free of expense during her lifetime." At the time of the testator's death there was a mortgage of \$1000 upon the land which was subsequently paid and released. The money with which it was paid was borrowed by John F. Walker, Jr., from the Gardenville Permanent Loan Association, upon a mortgage of said land. Under a foreclosure of this latter mortgage the said Association became the purchaser of the property and leased it to John F. Walker, Jr. The testator's widow filed her bill against John F. Walker, Jr., and the Gardenville Permanent Loan Association, to procure an allowance out of said land, and the rents and benefits issuing therefrom, of a sum sufficient

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Gardenville Permanent Loan Assoc'n *vs.* Walker.

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for her support and maintenance. The evidence is sufficiently set forth in the opinion of this Court. The Court below, (GRASON, J.,) passed a decree in favor of the complainant, from which the Association appealed.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

*R. R. Boarman*, for the appellant.

*Louis Hennighausen*, for the appellee.

BARTOL, C. J., delivered the opinion of the Court.

Since the decision of *Willett and Wife vs. Carroll*, 13 Md., 459, and *Donnelly vs. Edelin*, 40 Md., 117, there can be no doubt that by the will of John Frederick Walker, deceased, the farm or parcel of land by him devised in fee to his son, John Frederick Walker, Jr., was charged with the burden of a reasonable support and maintenance of the appellee, the widow of the testator, during her life; and the appellant, having purchased the land, took the same subject to this charge.

A careful reading of the testimony in the record has brought us to the same conclusion reached by the Circuit Court, that the appellee was justified in leaving the house of the defendant, Walker, and seeking a home elsewhere, for the reason that he failed to provide her with reasonable and necessary support and maintenance, while she remained a member of his family, such as she was entitled to enjoy under the will. She is entitled to maintain her bill for the enforcement of the charge for her reasonable maintenance and support, against the land in the hands of the appellant.

We are next to determine the amount to which she is entitled.

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Gardenville Permanent Loan Assoc'n vs. Walker.

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It appears in evidence that at the death of the testator, John F. Walker, Sr., the land devised to his son was encumbered by a mortgage executed by himself and wife in favor of Otto Gunther, for one thousand dollars. This mortgage debt was paid by the devisee, John F. Walker, Jr., and was released by Gunther's administratrix on the 16th day of February, 1872, and it further appears by the testimony, that the money borrowed from the appellant, and for which the property was mortgaged to the latter, was used in paying Gunther's mortgage; and the appellant contends that it is entitled, by subrogation, to the benefit of the mortgage lien held by Gunther, for the purpose of diminishing the charge of the appellee against the land.

If the appellant had taken an assignment of Gunther's mortgage, this claim on its part would be well founded; but the incumbrance upon the property having been paid by the devisee, and having been released, the same cannot inure to the benefit of the appellant, a stranger to that transaction. Under these circumstances, the principle of subrogation does not apply. *Woollen vs. Hillen*, 9 *Gill*, 185; *Alderson vs. Ames & Day*, 6 *Md.*, 52; *Neidig vs. Whiteford*, 29 *Md.*, 178; *Heuisler vs. Nickum*, 38 *Md.*, 270.

The appellant, having afterwards purchased the property took it subject to the charge under the will in favor of the appellee, unaffected by the lien of Gunther's mortgage, which had been extinguished.

It appears from the evidence that the gross rental value of the property is \$175 *per annum*, and the Circuit Court allowed to the appellee the whole of this sum, or \$14.58½ per month, and decreed the payment of the same and the arrearages at that rate.

In this we think there was error. The taxes and necessary repairs of the property ought first to be paid out of the rent, and the allowance to the appellee, even if it embraced the whole rental value of the land, would have to



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Troup vs. Appleman.

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be abated to that extent. There is much conflict in the testimony upon the question of what would be a just and reasonable allowance for the support and maintenance of the appellee.

Upon a consideration of the whole evidence, we think one hundred and fifty dollars *per annum*, or \$12.50 per month, looking to the net rental value of the land, is a fair, just and reasonable allowance, and that the arrearages ought to be estimated on that basis.

To the end that the decree of the Circuit Court may be modified in conformity to these views, the same will be reversed and the cause remanded; each party to pay one-half the costs of this appeal.

*Reversed and remanded.*

(Decided 16th July, 1879.)

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JOHN THOMPSON TROUP vs. ALPHEUS R. APPLEMAN.

*Attachment under the Act of 1864, ch. 306—Case where Acceptance of a note for a debt Fraudulently contracted created a New Contract, and operated as a Ratification of the Fraudulent act—Estoppel.*

Certain bonds of T. held by A. for safe-keeping, were sold by A. and the proceeds used by him. With knowledge of the fact, T. accepted and retained a promissory note of A., and others sent him by A. for the amount of the value of the bonds sold, and collected the interest on said note for two years. Upon an attachment issued by T. against A. under the Act of 1864, ch. 306, to recover the value of said bonds, upon the ground that the defendant "fraudulently contracted the debt, or incurred the obligation respecting which the action was brought," it was HELD:

1st. That the acceptance of the note, under all the circumstances connected with it, created a new contract between the parties, and operated as an affirmation and ratification of the conduct of A.

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Troup *vs.* Appleman.

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2nd. That such affirmance and ratification with full knowledge of all the circumstances, operated as a waiver, and T. was estopped from afterwards charging that the act of A. was wrongful or fraudulent.

APPEAL from the Circuit Court for Washington County.

The appellant instituted an action of attachment under the Act of 1864, ch. 306, to recover from the appellee the value of certain bonds, basing the action upon the ground that the defendant fraudulently contracted the debt or incurred the obligation in respect to which the action was brought. The Court below quashed the attachment and the plaintiff appealed. The case is further stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ROBINSON and IRVING, J.

*Tryon Hughes Edwards* and *H. H. Keedy*, for the appellant.

*A. K. Syester*, for the appellee.

BRENT, J., delivered the opinion of the Court.

This appeal is from the ruling of the Circuit Court for Washington County quashing an attachment, which had been issued in behalf of the appellant on the 12th of August, 1878,

The appellant, about April, 1870, placed in the hands of the appellee, who was a partner with Asbury G. Appleman, doing business in Hagerstown as bankers and brokers under the name of Appleman & Co., some government bonds, to be by him sold and invested in certain other named bonds, which latter bonds when so purchased were to remain in the custody of his firm for safe keeping. Whether the bonds were actually purchased, and set aside

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Troup *vs.* Appleman.

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for the appellant, distinct from the bonds of the firm, does not with certainty appear.

In August, 1870, the firm of Appleman & Co. seems to have been organized anew, under the name of "The National Bank of Hagerstown." Shortly afterwards Asbury G. Appleman sold out his interest to the appellee, who thereby became sole owner of the so-called Bank, with the assumed obligation to pay all its liabilities. About the year 1874 the appellee removed his Bank to Washington City, and there continued the business in which he had been engaged at Hagerstown.

The appellant, becoming distrustful, called upon him several times for the delivery to him of the bonds, which he supposed had been purchased for him and were still in the custody of the appellee. After several interviews, the appellee informed him that he had sold them and used the proceeds. Afterwards, and about the 1st of July, 1875, a statement was rendered to the appellant by the appellee, showing the value of the bonds so sold, which amounted to the sum of \$3900. At the foot of the statement was the following memorandum: "A. R. A. to give his note for \$3900, dated July 1st, 1875, for one year from date."

In August, 1875, the appellee, Alpheus R. Appleman, sent enclosed in a letter, to the appellant, John T. Troup, the following promissory note:

"\$3900.                      WASHINGTON, D. C., July 1st, 1875.

"One year after date we promise to pay to the order of J. T. Troup, thirty-nine hundred dollars, value received with interest from date.

A. R. Appleman,  
F. K. Zeigler,  
B. A. Garlinger."

. This note was accepted and retained by the appellant, and the interest upon it was paid to and received by him.

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Troup vs. Appleman.

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as it fell due on the 1st of July, 1876, and the 1st of July, 1877.

The note continued in his possession at the time this attachment was issued; no offer was made at any time to return it, but at the time of the hearing of the motion to quash, it was brought into Court to be cancelled.

Upon this state of the facts the greater part of the argument of counsel before this Court, was directed to the question, whether the original liability of the appellee for the conversion of the bonds came within the provision of the Act of 1864, ch. 306, authorizing process of attachment, where "the defendant fraudulently contracted the debt, or incurred the obligation respecting which the action is brought."

This question is not necessary for the decision of this case, and we shall express no opinion upon it. We are all of opinion that the acceptance of the note of July, 1st, 1875, under all the circumstances connected with it, created a new contract between the parties, and operated as an affirmance and ratification of the conduct of the appellee. The acceptance of the note by the appellant was with full knowledge of all the facts; the proposition to take it was contained in the written memorandum furnished July 1st, 1875, and the note with security was accordingly proffered and accepted the 16th of August, following—It was acted upon and treated by both appellant and appellee as an effective note, having for its consideration the actual indebtedness of the one to the other. No matter what may have been the mental reservation of the appellant, the facts of the case do not support the theory that it was offered and accepted as collateral security. On the contrary, we are satisfied from the proof that it was given and accepted for the amount ascertained to be due from the appellee to the appellant on account of money which came into his hands from the sale of bonds. Being so accepted and treated for more than three years,

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Geekie vs. Harbourn.

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before the issuing of this attachment, its acceptance cannot be viewed in any other light than as a ratification and confirmation of that act. It is now too late for the appellant to charge as fraudulent, the creation of a debt by an act which he has so decisively recognized and affirmed.

That a sale of bonds under circumstances like the present, may be recognized and affirmed, and the relation of ordinary debtor and creditor thereby established between the parties, has not been controverted in the argument of counsel, and we need only cite the case of *Cooke vs. Tullis*, 18 *Wallace*, 332, in support of the doctrine.

It is hardly necessary to add, that an affirmance and ratification of an act, *with full knowledge of all its circumstances*, operates as a waiver, and the party is estopped from afterwards charging, that it was wrongfully or fraudulently done.

In this view of the case before us, we think the Circuit Court acted without error in quashing the attachment, and its judgment will be affirmed.

*Judgment affirmed.*

(Decided 16th July, 1879.)

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CHARLES W. GEEKIE vs. WILLIAM B. HARBOURN.

*Removal of Causes under the Constitution as modified by the Act of 1874, ch. 364—Appeals from judgments of Justices of the Peace not embraced in said Act.*

The provision in the Constitution relating to the removal of causes, as that provision has been altered by the amendment of 1874, ch. 364, does not extend to the case of an appeal from a justice of the peace pending in a Circuit Court.

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Geekie vs. Harbourn.

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APPEAL from the Circuit Court for Kent County.

The appellant was sued by the appellee before a justice of the peace of Kent County, and judgment being rendered against him, he appealed to the Circuit Court. In that Court he applied for a removal of the case on the ground that he could not have a fair and impartial trial before a jury of Kent County. The Court, (WICKES and STUMP, J.,) passed an order refusing the application, and the defendant appealed.

The cause was submitted to BARTOL, C. J., BRENT, GRASON, MILLER, ALVEY and ROBINSON, J.

*James A. Pearce*, for the appellant.

No counsel appeared for the appellee.

ALVEY, J., delivered the opinion of the Court.

The only question in this case is, whether the power of removal of causes, as given and limited by the Constitution, applies to the case of an appeal from a justice of the peace pending in a Circuit Court. The provision in the Constitution authorizing removals has never been construed as extending to cases of appeal pending in the Circuit Courts, and we are clearly of opinion that it has no application to them whatever. In the case of *Hoshall vs. Hoffacker*, 11 Md., 362, it was held that under the provision of the Constitution of 1851, then in force, in relation to removal of causes for trial, the Circuit Courts had no power to remove causes pending before them *on appeal*. That was a case of an appeal from an order of the County Commissioners pending in the Circuit Court; but the principle and reason of the decision are completely applicable to this case, and must be taken as conclusive of it. The provision in our present Constitution in relation to removal of causes, as that provision has been altered by the amend-

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James vs. Rowland.

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ment of 1874, ch. 364, is substantially the same as that contained in the Constitution of 1851, so far as the nature and character of the causes or proceedings embraced by it, are concerned, except as to petitions for freedom, not mentioned in the present Constitution; and there can be no reason why the construction, in this respect, of the two clauses, should be different. See also *Cooke vs. Cooke*, 41 *Md.*, 368.

The order of the Court below must, therefore, be affirmed.

*Order affirmed,*  
*with costs.*

(Decided 16th July, 1879.)

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WATKINS JAMES (OF BENNETT) vs. ISAAC N. ROWLAND.

*Construction of a Will containing a Devise over after an Indefinite failure of Heirs, made prior to the Act of 1862, ch. 161.*

The will of W. J. dated the 29th April, 1848, and admitted to probate April 10th, 1849, contained the following clause: "First, I give and bequeath to my son B. the farm which I have lately purchased of G. W. D., containing one hundred and seventeen acres more or less, to hold the same only during his natural life, and after his death to fall to his son W. J., should he be living, to have the same, he and his heirs in their own proper right and behoof forever, but if the said W. J. should die without heirs, then I will and direct that the said farm be sold and the proceeds arising therefrom be equally divided among my four children or their heirs, viz., the heirs of A. J., deceased, C. C., J. F. and W. J., Jr., share and share alike; the share to which the said W. J., Jr. may be entitled to be equally divided between his two children F. and L. J. But it is my will and I hereby further direct that the said farm shall be, and I hereby charge it with the sum of twelve hundred dollars to be paid by my son B., or if he be dead, by his son J., to be paid in three equal annual instalments after my decease." **HELD:**

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James *vs.* Rowland.

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- 1st. That the Act of 1862, ch. 161, regulating the construction of certain doubtful expressions could not be resorted to in aid of the construction of this will which took effect and created vested interests in 1849.
- 2nd. That it was clear the testator meant to give to his son B., only a life estate, and that if on B's death the testator's son W. J. was living, he was to take an immediate fee; and if when the life estate ended W. was dead, but he had descendants living, they would take a fee, and that only on failure of both these contingencies at the death of the tenant for life was the attempted executory devise to take effect.
- 3rd. That the limitation over was upon the failure of *heirs generally*, which being an indefinite failure, could not be supported, no matter to what time such failure is supposed to refer, the life tenant's death, or the death of W. in the life-time of the tenant, or at W's death whenever it should occur.

APPEAL from the Circuit Court for Washington County, in Equity.

The bill in this case was filed by the appellant to compel the specific performance of a contract made between himself and the appellee for the sale to the latter of a farm which the complainant claimed to own in fee under a devise, the terms of which are set forth in the opinion of the Court. The property was devised to him after the death of his father, who is alleged in the bill to be dead. The defendant, in his answer, admitted the contract and the death of the life tenant, but resisted a compliance with the contract, on the ground that by the terms of said will the complainant only had a life interest in said land, and could not give him a fee simple title thereto. By consent a *pro forma* decree was passed by the Court below, dismissing the bill and ordering and directing the said contract to be surrendered and cancelled.

The complainant appealed.

The cause was submitted to BARTOL, C. J., BRENT, GRASON, ALVEY, ROBINSON and IRVING, J.



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James vs. Rowland.

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*John L. McAtee and A. K. Syester*, for the appellant.

When no other point of time is certainly pointed out by the words of a will, at which an ulterior or future estate is to take effect, it will be construed to refer to the lifetime of the testator, or if there is a preceding particular estate, then upon the termination of that. *Howe vs. Pillans*, 2 *Mylne & Kean*, 20, 21; *Cambridge vs. Rous*, 8 *Ves.*, 21; *Briggs, et al. vs. Shaw*, 9 *Allen*, 517; *Ommamey vs. Bevan*, 18 *Vesey*, 291; *Hinckley vs. Simmons*, 4 *Vesey*, 160; *Galland vs. Leonard*, 1 *Swan*, 161; *Hervey vs. McLaughlin*, 1 *Price*, 264; *Doe vs. Sparrow*, 13 *East.*, 359; *King vs. Taylor*, 5 *Vesey*, 806; *Wright vs. Stephens*, 4 *Barr. & Ald.*, 574.

These rules would be sufficient to determine a devise made in terms doubtful and uncertain. Their aid would not seem to be required here, for estates could not be created in terms more clear and certain than those which devise "to my son, Bennett, to hold the same only during his natural life, and after his death to fall to his son, Watkins James, should he be living, to have the same, he and his heirs, in their own proper right and behoof forever."

The latter estate is a gift in fee, and as such, will not be cut down or abridged by subsequent ambiguous words.

Where an estate is by former clauses of a will, given so as to vest absolutely, it can only be revoked, altered and retracted by the most plain and unambiguous proviso. *Howe vs. Pillans*, 2 *My. & K.*, 26; *Briggs, et al. vs. Shaw*, 9 *Allen*, 418; *Thornhill vs. Clark*, 2 *Clark & Fin.*, 36; *Abbott vs. Middleton*, 7 *H. L. Cas.*, 84, 102.

Another provision of this will is sufficient to support the fee contended for, even if no express words had been used. This is found in the last clause of the same "first item" in the "charge upon the farm to be paid by my son Bennett, or if he be dead, by his said son, — James, to be paid in three equal annual instalments, after my decease."

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James vs. Rowland.

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This is a gross sum charged not only upon the lands, but is a personal charge; is to be paid at all hazards; implies, therefore, a power to sell, and is of itself sufficient to vest a fee.

Such a charge will create a fee where the interest has not been specified. The relative value of the charge to the estate makes no difference. The contingent or future nature of the charge does not prevent it from enlarging the estate. 2 *Jarman on Wills*, 172, *side*; *Smith vs. Tynedale*, 2 *Salkeld*, 685; *Doe vs. Richards*, 3 *Term*, 358; *Moore vs. Heareman, Willes*, 440; *Goodtitle vs. Maddern*, 4 *East*, 496; *Doe vs. Snelling*, 5 *East*, 87, 91; 2 *W. Blk.*, 104; *Doe vs. Holmes*, 8 *Durn. & East*, 1; 2 *Cowper*, 657; 10 *Wheaton*, 231; *Gardner vs. Gardner*, 3 *Mason*, 309, 312; *Wait vs. Belding*, 24 *Pick.*, 129; *Gibson vs. Horton*, 5 *H. & J.*, 180; *Beall vs. Holmes*, 6 *H. & J.*, 208, 216, 220.

These considerations make it clear, that the clause from which doubt has arisen, provided for the disposition of the farm in question, in case Watkins James died without heirs, during the continuance of the life estate of Bennett, and was alternative, and not intended as a revocation of the absolute estate just before devised to him, Watkins, after the death of Bennett, should he be living.

*William Kealhofter*, for the appellee, submitted on the record.

IRVING, J., delivered the opinion of the Court.

The decision of this case, which comes up on appeal from a *pro forma* decree passed by consent, depends upon the proper construction to be given to the following clause of the will of Watkins James, dated the 29th day of April, 1848, and admitted to probate April 10th, 1849:

"First, I give and bequeath to my son Bennett, the farm which I have lately purchased of George W. Dillahunt, containing one hundred and seventeen acres, more

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James vs. Rowland.

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or less, to hold the same only during his natural life, and after his death to fall to his son, Watkins James, should he be living, to have the same, he and his heirs, in their own proper right and behoof forever; but if the said Watkins James should die without heirs, then I will and direct that the said farm be sold, and the proceeds arising therefrom, be equally divided among my four children or their heirs, viz., the heirs of Abram James, deceased, Cordelia Coffman, Jamima Farren, and Watkins James, Jr., share and share alike; the share to which the said Watkins James, Jr., may be entitled, to be equally divided between his two children, Francis and Louisa James. But it is my will, and I hereby further direct, that the said farm shall be, and I hereby charge it with the sum of twelve hundred dollars, to be paid by my son Bennet, or if he be dead, by his son — James, to be paid in three equal annual instalments, after my decease.”

The question is, what estate did Watkins James, son of Bennett James, take in the land in question? It is perfectly clear that if Watkins should be living at the death of Bennett, the testator intended him to take a fee, and used the most apt words to effect that purpose. The only question is, are there any words in the will making a fee defeasible at any time; and making a good, executory devise over? The Act of 1862, ch. 161, regulating the construction of certain doubtful expressions in a will, cannot be resorted to in aid of the construction of this will, which took effect and created vested interests in 1849. Like the statute of England of 1837, from which it was evidently copied, it creates a change in the common rule of interpretation, and only affects wills made and executed afterwards, for the patent reasons that the testator is always to be understood as using the words employed, in the sense attaching to them at the time he uses them, and that the devisee is entitled to the construction they would have received at the time they became operative, had the ques-

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James vs. Rowland.

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tion arisen, without being affected by an after-established statute, applying a new meaning to the words. Applying the long established rules of construction, we have no hesitation or difficulty in determining the true meaning of this testator, or of the words he uses to convey it. It is clear that he meant to give to his son Bennett only a life estate, and that if on Bennett's death, his son, (testator's grandson) Watkins James, was living, he was to take an immediate fee; and if when the life estate ended Watkins was dead, but he had descendants living, they were to take a fee, and that only on failure of both these contingencies at the death of the tenant for life, was the attempted executory devise to take effect. The language he uses is as strong as any that could be employed to create a fee in Watkins, "to him and his heirs in their own right and behoof forever." The limitation over is upon failure of *heirs generally*, which, being an indefinite failure, cannot be supported, no matter to what time such failure is supposed to refer—the life tenant's death, or the death of Watkins in the life-time of the tenant, or at Watkins' death, whenever it should occur. Technical words will always receive a technical construction, and be held as used in their technical sense, unless the contrary clearly appears from the context; and where the same word is used twice, in relation to the same subject, it will be held as meaning the same thing in both instances, unless the contrary appears. 2 *Jarman on Wills*, 526, and 2 *Wms. Ex.*, 971-973.

It is possible the testator meant *descendants* by the term *heirs* in the executory devise, but if he did it would not alter the necessary effect of not restricting the failure of such descendants to a definite period. So that it really makes no difference whether the testator intended to refer to such failure of "heirs" at the death of the tenant for life, or at the death of his son Watkins, whenever that might occur. The result would be the same. If there

Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

could be any doubt as to the testator's intention, that his grandson should have a fee, if he lived to come into possession, at his father's death, the charge imposed on his father, and then on him, of twelve hundred dollars to be paid in three equal annual instalments, would solve it. Such charge, personal in character, and charged on the land in *their* hands, without any words of inheritance, have always been held to imply a fee. *Jackson vs. Bull*, 10 *Johnson*, 148-151; *Goodtite vs. Maddern*, 4 *East*, 496.

Inasmuch as we think Watkins James, son of Bennett, upon his surviving his father, took an unquestionable fee in the land devised to him, and no other objection is made to the execution of the contract of sale according to its terms, the decree will be reversed and cause remanded, to the end that a proper decree for specific performance, according to the terms and stipulations of the contract set out in the proceedings may be passed.

*Judgment reversed with costs,  
and cause remanded.*

(Decided 16th July, 1879.)

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THE PLANTERS' MUTUAL INSURANCE COMPANY OF  
WASHINGTON COUNTY *vs.* PETER and CHARLES C  
ENGLE, trading as PETER ENGLE & SON.

*Action on Policy of Fire insurance—Construction of the Policy as affected by the Intention of the parties concerning what was to be Insured, and whether it covered goods Consigned to be sold on Commission—Question of fact for the Jury—What constitutes Ownership—Waiver of proofs of Loss—Whether the word "Guano" in the policy embraced other Fertilizers—Admissibility of declarations of an Officer of the Company in regard to his Construction of the Policy.*

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Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

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An application for insurance, which was made part of the policy issued upon said application, stated that the applicants proposed to insure "our property which we describe as follows: No. 1 three thousand dollars on *stock in trade*, consisting of grain, *guano* and salt in forwarding house." The applicants bought and sold grain, guano and salt on their own account, they also sold fertilizers on commission. Certain fertilizers delivered to them for sale on commission, having been damaged by fire, the insured wrote a letter to the Insurance Company after the loss, in which, after stating that the owners of the fertilizers insisted that their fertilizers were covered by the policy, they say "*we do not think so.*" In an action upon the policy to recover for said loss, it was HELD:

- 1st. That looking to the face of the policy and the nature of the business in which the plaintiffs were engaged, it was doubtful, to say the least, whether they intended to insure goods held by them on commission and for the loss of which they were not responsible; but the doubt, if any, was entirely removed by said letter.
- 2nd. That if the intention did not exist when the policy was issued, it could not subsequently be imported into the contract.
- 3rd. That the policy embraced only such stock in trade as belonged to the plaintiffs, and did not therefore embrace fertilizers consigned to them for sale on commission.
- 4th. That whether the fertilizer belonged to the plaintiffs, or was held by them for sale on commission, was a question for the jury, to be determined under instructions by the Court.
- 5th. That if it was bought by the plaintiffs, or if they had become liable for it to the owners by course of dealing, it would be embraced in the policy.
- 6th. That the fact that the fertilizer was charged to them when delivered, with the understanding that they were to account for it at the price thus charged when sold, and if not sold it was to remain in their hands subject to the order of the persons from whom they received it, would not make the plaintiffs the owners of it, but on the contrary, they would under such circumstances still hold it as consignees.

Two agents of the defendant who were sent to inspect and ascertain the nature and extent of the loss, on being told by the plaintiffs that they were not certain whether the fertilizer in question belonged to them, or was held for sale on commission, requested the plaintiffs not to include in the proofs any fertilizers not in fact belonging

Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

to them, and that if this fertilizer proved to be the property of the plaintiffs, the defendant would pay for it. **HELD:**

That if this fertilizer was omitted in the proofs of loss in consequence of what was thus said to the plaintiffs, such acts and conduct on the part of the defendant would amount to a waiver of proof of loss in this respect.

At the time the policy was issued, the plaintiffs had fertilizers on hand but did not have any guano, and in the partial settlement of loss, the defendant paid the plaintiffs for all fertilizers which were admitted to be their property, and refused to pay for such as were held on commission. **HELD:**

1st. That it was clear that the plaintiffs meant the word "guano" to embrace fertilizers.

2nd. That it might fairly be implied that the defendant also understood the word as used in the policy in the same sense.

3rd. That a letter written by the Treasurer of the defendant to the plaintiffs, being but the written declaration of an officer of the defendant in regard to his construction of the policy, was not admissible in evidence as against the plaintiffs.

4th. That if the proofs of loss were furnished in time, and such proofs were defective, and no objection was made to them by the defendant on that ground, but the refusal to pay was based on other grounds, the defendant would be considered as having waived all objections to the proofs on the ground of such defects, and would not be permitted to rely on them in a suit on the policy.

**APPEAL** from the Circuit Court for Washington County.

The case is sufficiently stated in the opinion of the Court.

*First Exception.*—The defendant offered in evidence the following letter written by its Treasurer:

HAGERSTOWN, January 17th, 1876.

Messrs. P. Engle & Son,

Gentlemen:—Your account of loss was received the latter part of last week, and I will lay the same before our

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Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

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board at their meeting on Saturday next; I also received your letter of this date as to my opinion as to the liability of our company to your commission merchant in Baltimore. I am decidedly of the opinion that they have no claim on the company. The company did not insure property for any one but your firm. Your application does not ask for insurance on any property that does not belong to you. You will observe, in the heading of your application, that you ask for an insurance on *your* property—not that belonging to a third party. Mr. Smeltzer might as well claim pay for his flour that was placed under your care for shipment; and it is very clear to my mind, that he has no claim whatever.

Yours very truly,  
GEO. W. POLE.

The plaintiffs objected, and the Court, (MOTTER and PEARRE, J.,) sustained the objection, and refused to let said letter go to the jury. The defendant excepted.

*Second Exception.*—The evidence being closed, the plaintiffs offered the following prayers:

1. If the jury find the execution of the policy by the defendant, read in evidence, and that the plaintiffs' stock in trade was injured or destroyed by fire on or about the 14th of December, 1875; and that thereafter, and within ten or fifteen days thereafter, the plaintiffs notified the defendants' agent of such loss or injury; and further find that pursuant to such notice the witnesses, Messrs. Pole and Strite, were sent by the defendant to confer with the plaintiffs respecting such loss and injury, or to examine into the extent of such losses, and that they did so confer and examine; and that it was then and there, on the part of the said Pole and Strite, (acting for the defendant,) agreed that the defendant would pay for the loss of certain articles consumed or injured by the fire; and further find that pursuant to such agreement the plaintiffs made out a



Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

list of their losses, and furnished an itemised statement thereof to the defendant; and further find that the defendant took the said statement and examined it, and struck from it only such articles as the defendant did not think was covered by the policy, and agreed to pay for the balance, and did pay for the balance, and that the defendant did not notify the plaintiffs that it (the defendant) was not satisfied with the preliminary proofs of loss, and did not notify the insured of any defect in such preliminary proof, but placed its refusal to pay for the loss on any goods claimed for as lost by the plaintiffs, upon the ground that such goods were not covered by the policy, then the defendant has waived the conditions in the policy and by-laws in reference to preliminary proofs, and the plaintiffs' claim cannot be defeated on that account.

3. As a substitute for the plaintiffs' third prayer, the Court instructed the jury as follows: That if Pole and Strite, at the time of their visit, were informed by the plaintiffs of the loss of certain fertilizers held by them on commission, and told the plaintiffs that the defendant would not be responsible for such goods, and thereby induced the plaintiffs not to include them in their notice of loss furnished, then the mere omission of them from such statement would not prevent the plaintiffs' recovery for them, if the defendant was informed of such action of said Pole and Strite, and did not notify the plaintiffs in a reasonable time that defendant required preliminary proof of such loss of said articles.

5. If the jury find, in respect to the Whitelock fertilizer, that Whitelock & Co., sent the same to the plaintiffs, and charged them up at a stipulated price therefor, and that the plaintiffs' agreement with the said Whitelock & Co. was, that they should be so charged, and that the plaintiffs might sell at any figure or price above that charged against them, and were to account only with Whitelock & Co. for the amount charged against them for the fer-

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

tilizers, and not for what they sold them for, then such a contract is not a contract of consignment of goods to be sold on commission, even though the jury may find that so much of the said fertilizers as remain unsold were at the disposal of Whitelock & Co.

7. As a substitute for the plaintiffs' seventh prayer, the Court granted the following:

That if the jury find that at the time of the fire there was in the warehouse of the plaintiffs a certain quantity of Whitelock's fertilizer, and that when Pole and Strite went to the place of the fire, as agents of the defendant, to ascertain the losses, and that while there the said plaintiffs and Pole were engaged in making up a statement of such losses, and while so engaged the plaintiffs told Pole, as agent of the Company, and to be communicated to it, that they did not know, in fact, whether such fertilizers was or was not their property, or whether it was there for sale on commission, and then was told by Pole that the Company would not pay for any loss upon it if it was held on commission, but if held as their own, it would be paid for, and that by reason of this uncertainty, it was not included in the statement of losses then made out; and if they shall find that such fertilizer was, in fact, the property of said plaintiffs, and was not there for sale on commission; and if the defendant, as soon as said Pole returned home, was informed of these facts, and did not notify said plaintiffs to furnish the preliminary proof required by the policy as to the loss of such fertilizer, and made a partial settlement with the insured for such liability as it acknowledged, leaving this loss unpaid, the plaintiffs are not precluded from a recovery for the loss on such fertilizer, nor by reason of their failure to furnish such preliminary proof.

And the defendant offered the following prayers:

1. If the jury believe from the evidence that at the time of the fire the Whitelock fertilizers destroyed therein

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

were fertilizers held over at the end of the season of 1875, and that they were held subject to the order of the Whitelocks, then the plaintiffs did not have such property therein as the policy in evidence covered, and the plaintiffs are not entitled to recover for such fertilizers.

2. If the jury find that after the policy offered in evidence was affected by the plaintiffs, to wit, in the fall of 1875 the plaintiffs obtained from Messrs. Whitelock & Co. certain fertilizers, and that a portion of said fertilizers were destroyed by fire on the 14th December, 1875; that said plaintiffs notified the defendant of said fire, and that the witnesses, Pole and Strite, as a committee of the defendant, went to the scene of said fire, communicated with the senior member of the plaintiffs, and told him to make out and forward a statement of loss and damages by said fire; and further find, that during the conversation or conversations then had between the said plaintiffs and the said Pole and Strite, the plaintiffs made no claim or demand for payment for said Whitelock fertilizers so destroyed, and did not, within thirty days after said fire, make any claim or demand for the same, nor furnish to the defendant an account of such loss, signed and verified by oath or affirmation, as required by the seventh condition attached to said policy, then the plaintiffs are not entitled to recover for said fertilizers in this action.

3. If the jury find that at the time the policy of insurance was effected by the plaintiffs, no application was made to the defendants, either in writing or verbally, to include the leather which was destroyed by said fire in said policy; and further find, that after said fire they sent to the defendants the statement of loss offered in evidence, containing an item of leather, and that Mr. Pole, the agent of the defendant, objected to such item and loss as not covered by the policy and application, and that such item was not admitted by the said agent of the defendant, and that another statement was furnished the defendant,

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

made out by the said Pole upon consultation and with the assent of said plaintiffs, which omitted said item of leather, and that said second statement was presented to and approved by the Board of Directors of the defendant, and the amount of it paid by them to the plaintiffs in full, and that the plaintiffs did not then make, and have not since, at any time before the commencement of the trial of this cause, made any claim and demand upon the defendant for payment for said leather, then the plaintiffs cannot recover for said item.

4. The plaintiffs are not entitled to recover for the fertilizers sued for in this action, because they have not offered evidence that they did within thirty days after said fire, give notice of the loss of said fertilizers to the defendant, and delivery to the Secretary of the defendant a particular account of such loss or damage, signed and verified by oath or affirmation as required by the seventh condition attached to the policy, and there is no sufficient evidence of any waiver by the defendant of the requirements of said condition of the policy with regard to said proofs.

5. And for the same reason the plaintiffs are not entitled to recover for any of the articles sued for in this action.

6. That the plaintiffs, by the acceptance of the policy in this cause, became members of the defendant's Company, and as such were bound by its charter and by-laws, and that by said charter and by-laws Messrs. Pole and Strite had no authority to waive the requirements of the seventh condition of the policy in regard to the preliminary proofs of loss, (unless properly authorized so to do by the defendant,) and, there being no evidence in this cause that they were so authorized, the onus is upon the plaintiffs to prove to the jury that said preliminary proofs of loss were sent to the Secretary of the defendant within thirty days after the fire, and unless they so prove to the

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

satisfaction of the jury, the plaintiffs are not entitled to recover.

7. That the application of the plaintiffs for insurance is part of the policy, and the insurance was only upon such property of the plaintiffs as was specified in the application, and included within its terms; that the term "stock in trade" in the policy is to be construed to mean grain, salt and guano, and if the jury find that the plaintiffs have been paid for the grain, salt and guano, which they lost by said fire, then the plaintiffs are not entitled to recover in this action.

8. If the jury believe from the evidence that the application was prepared by the agent of the Company, according to the directions of Peter Engle, and in good faith, and thereafter Engle & Son signed it, and the policy was issued on this application, and was accepted by Engle & Son, and that after the fire the plaintiffs presented to the Company the first list of losses in evidence, and that thereafter the plaintiffs assented to the striking out of all articles, except grain, salt and guano, or fertilizers, and that the plaintiffs then sent to the Company the second statement of loss, as prepared by Pole and the plaintiffs, and that this amount was paid and receipted for by the plaintiffs, then from these facts, the jury may infer that the stock in trade covered by the policy, was to consist of the articles set forth in the application, and that such was the contract of insurance, and if they do so find and believe that such property has been fully paid for, the plaintiffs are not entitled to recover.

9. If the jury believe from the evidence that after the fire the Company's agents directed the plaintiffs to make out a statement of losses, and to include therein all of the property owned by the plaintiffs, and that the plaintiffs submitted to the Company the statement and amended statement in evidence, and in each list enumerated a quantity of fertilizers, and did not include the Whitelock

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

fertilizer in either, but that the plaintiffs at that time claimed that these fertilizers did not belong to them, then it was not the intent and meaning of the contract of insurance between the parties to cover such loss, and the plaintiffs are not entitled to recover for it.

The Court granted the plaintiffs' first prayer, and also the fifth, and for the third and seventh prayers of the plaintiffs granted substitutes, and rejected the rest of the plaintiffs' prayers, and all the prayers of the defendant as offered, and in place of the defendant's third prayer, they granted a substitute as follows:

3. The jury are instructed that the plaintiffs are not entitled to recover for anything not embraced in the policy and application, and that leather, bran and bacon are not so embraced.

The Court also gave an instruction to the jury, as follows:

If the jury shall find that the plaintiffs wrote to the defendant that they wanted insurance upon their stock in trade to amount of \$3000, and George W. Pole, as agent of the defendant, went down to the place of business of the plaintiffs, and was there informed that the plaintiffs were carrying on a forwarding and commission business, also buying and selling certain goods on their own account, and was told by the plaintiffs that they wanted insurance on their stock in trade, and that said Pole thereupon drew up the application in evidence, which was signed by the plaintiffs, and the defendant was informed of these facts by said Pole on his return, and thereupon the policy in evidence was issued to the plaintiffs, the jury may from these facts find that the policy does cover goods in the warehouse at the time of the fire, held on commission, of the nature and character of those specified in the application, to wit, grain, guano and salt.

The defendant excepted, and the verdict and judgment being rendered against it, appealed.

Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ROBINSON and IRVING, J.

*Louis E. McComas* and *Henry Kyd Douglas*, for the appellant.

*Wm. Kealhofter* and *A. K. Syester*, for the appellees.

ROBINSON, J., delivered the opinion of the Court.

This is an action on a policy insuring "*the stock in trade*" of the appellees against loss by fire.

The main question is, whether certain fertilizers delivered to the appellee *sfor sale on commission*, are covered by the policy?

We understand it to be conceded that a *consignee* of goods delivered to be sold on commission, has an *insurable interest* in such goods. Thus far the law is well settled.

Whether it is necessary for the *insured* to set forth in the application or policy the nature and extent of the interest, for the protection of which the insurance is intended, is a question about which there is some conflict of opinion.

The Supreme Court, in the *Columbia Ins. Co. vs. Lawrence*, 2 *Peters*, 25, held that it was, for the reason, among others, that insurances against fire are made in the confidence that the insured will use all the precautions to avoid loss which his own interest would suggest, and that the extent of this interest must always influence the underwriters in taking or rejecting the risk and estimating the amount of premium.

These views have been recognized and adopted in several States.

The current of decisions, however, seem to be the other way, and to hold that it is sufficient if the *subject-matter* of the insurance, and the *nature of the risk*, are set forth in

Planters' Mut. Ins. Co. of Washington Co. *vs.* Engle & Son.

the policy, without stating the *extent* of the interest of the insured in the property, unless so required by the conditions of the policy, or where the failure to state it would operate as a fraud. *Niblo vs. The North American Ins. Co.*, 1 *Sand.*, 551; *Tyler vs. Aetna Ins. Co.*, 12 *Wend.*, 507; *Locke vs. North American Ins. Co.*, 13 *Mass.*, 61; 1 *Caines*, 276; 1 *Johns.*, 276; *Phillips on Ins.*, 41, 64, 94; 2 *American Leading Cases*, 930.

It is unnecessary, however, to decide this question here, because, conceding that the plaintiffs were not obliged to state the nature and extent of the interest to be insured, we are of opinion that they did not intend to insure the goods held by them for sale on commission.

As a general rule, an insurance on "*the stock in trade*" of a merchant means such goods as he may from time to time buy in the ordinary course of business.

But it is argued that inasmuch as the plaintiffs were forwarding and commission merchants, a policy issued to them on stock in trade must be construed as embracing not only goods bought and sold by them, but also goods delivered for sale on commission. This may or may not be so, according to the intentions of the parties.

Now in this case, the plaintiffs in their application, which is made part of the policy, propose to insure "our property which we describe as follows: No 1. Three thousand dollars on *stock in trade*, consisting of grain, guano and salt in forwarding house." Here is an application to insure *our property*, *our stock in trade*, and the record shows they bought and sold grain, guano and salt on their own account, and that they also sold fertilizers on commission. If they had been engaged in carrying on a commission business simply, then it might well be contended that the policy covered goods for sale on commission, because in that event they could have had no other goods on hand constituting "*stock in trade*," to be protected by the insurance.

So looking to the face of the policy and the nature of the business in which the plaintiffs were engaged, it is



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Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

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doubtful, to say the least, whether they intended to insure goods held by them on commission, and for the loss of which they were not responsible. But the doubt, if any there be, is entirely removed by the letter written by the plaintiffs to the Insurance Company after the loss, in which, after stating that the owners of the fertilizers insist that their fertilizers are covered by the policy, the plaintiffs say "*we do not think so.*" Here, then, is written admission by the plaintiffs after the loss, that they did not intend to insure the fertilizers held by them for sale on commission, and now, in the face of this admission, they ask a Court to say, that they did mean to insure such fertilizers. It is hardly necessary to say, the plaintiffs could not take out a policy to insure their own property, and then appropriate it to the use of somebody else as an after thought. If the intention did not exist when the policy was issued, it could not subsequently be imported into the contract. *Steele vs. Franklin Insurance Co.*, 5 Harris, 290; *Newsom vs. Douglass*, 7 Harris & Johnson, 451; *Augusta Ins. Co. vs. Abbott*, 12 Md., 348; *Watson vs. Swann*, 11 C. B. N. S., 755; *Fleming vs. The Marine Ins. Co.*, 4 Wharton, 59.

We are of opinion, therefore, that the policy issued in this case, embraces only such stock in trade, as belonged to the appellees, and that it does not, therefore, embrace fertilizers consigned to them for sale on commission.

In regard to "Whitelock's fertilizer," there seemed to be some conflict in the testimony, whether it belonged to the plaintiffs, or was held by them for sale on commission. This was a question for the jury to be determined under instructions by the Court. If it was bought by the plaintiffs, or if they had become liable for it to the owners by course of dealing, it would be embraced by the policy.

We do not think, however, the plaintiffs' fifth prayer states the law accurately on this subject. The fact that the fertilizer was charged to them when delivered, with

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Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

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the understanding that they were to account for it at the price thus charged if sold, and if not sold, it was to remain in their hands subject to the order of Whitelock & Co., would not make the plaintiffs the owners of the fertilizer. On the contrary they would under such circumstances still hold it as consignees.

As to the proofs of loss, it was necessary of course for the plaintiffs to furnish such proofs within the time prescribed by the policy; or to prove that this condition had been waived by the insurer.

It appears that the Whitelock fertilizer was not embraced in the proofs of loss, but the plaintiffs proved that Messrs. Pole and Strite were sent by the company to inspect and ascertain the nature and extent of the loss; that the plaintiffs told them they were not certain whether the *Whitelock fertilizer* belonged to them, or was held for sale on commission.

That Pole then requested the plaintiffs not to include in the proofs any fertilizers not in fact belonging to them, and that if the Whitelock fertilizer proved to be the property of the plaintiffs the Company would pay for it.

If this fertilizer was omitted in the proofs of loss in consequence of what was thus said to the plaintiffs, such acts and conduct on the part of the Company would, in our opinion, amount to a waiver of proof of loss in this respect.

It was also argued that *guano*, as used in the policy, does not embrace *fertilizer*. Strictly speaking, it may be true that guano does not embrace every kind of fertilizer used for agricultural purposes. But we are dealing with a contract of insurance, and the question is, what did the parties mean by it as used in this connection? The proof shows that at the time the policy was issued the plaintiffs had fertilizers on hand, but did not have any guano, and it

Planters' Mut. Ins. Co. of Washington Co. vs. Engle & Son.

is very clear that they meant it to embrace such fertilizers. And it also appears in the partial settlement of loss the Insurance Company paid the plaintiffs for all fertilizers which were admitted to be their property, and refused to pay for such as were held on commission; and we think it may therefore be fairly implied, that the insurer also understood the word as here used to embrace fertilizers.

The letter written by Pole, the treasurer of the Company, to the plaintiffs, was clearly not admissible in evidence as against the latter. It was but the written declarations of an officer of the Company in regard to his construction of the policy.

The proposition of law embraced in the first prayer is too well settled to admit of discussion. If the proofs of loss were furnished in time, and such proofs were defective, and no objection was made to them by the defendant on that ground, but the refusal to pay was based on other grounds, the insurer will be considered as having waived all objections to the proofs on the ground of such defects, and will not be permitted to rely on them in a suit upon the policy.

It follows also from what we have said, there is no error in the instruction granted by the Court in lieu of the plaintiffs' seventh prayer. The facts set forth in this instruction if found by the jury would amount to a waiver of proof in regard to the Whitelock fertilizer.

Being of opinion that the plaintiffs are not entitled to recover for fertilizers held on commission, the instruction granted as a substitute for the plaintiffs' third prayer has no longer any application to this case.

We find no error in the refusal to grant the several prayers offered by the defendant.

The Court erred, however, in granting the plaintiffs' fifth prayer, and also in the instruction given by the Court

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Stanhope & Co. vs. Dodge, *et al.*

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itself, and for these reasons the judgment will be reversed.

*Judgment reversed, and  
new trial awarded.*

(Decided 16th July, 1879.)

MILLER, J., dissented.

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LEWIS G. STANHOPE and JAMES R. McLAUGHLIN,  
trading as STANHOPE & Co., and others vs. FRANCIS  
DODGE, and others, Trustees, and others.

*Charge upon land to secure sums due for Ouelty of Partition—  
Difference between such Charge and a Vendor's lien—The  
Charge not impaired by a Subsequent deed of Trust of the  
same land made to secure the same sums—Case of a Deed  
held to be a deed of Trust and not a Mortgage, and not  
affected by the provisions of the Code relating to the Exe-  
cution and Recording of mortgages—Construction of sec. 19  
of Art. 24 of the Code, relating to the Recording of deeds—  
Effect of recording deeds after the time prescribed by law, as  
to the rights of Prior and Subsequent creditors—Case of a  
Deed held to be a Mortgage—Question whether the Affidavit  
to the consideration was in due form and made before the  
proper officer—Effect of not recording the Mortgage within  
six months from its date—Constructive notice.*

On the 10th of February, 1877, W. D., conveyed certain land to trustees for the benefit of his creditors. The trustees made sale of the same, and an account was stated by the auditor distributing the proceeds amongst certain preferred creditors. The land thus sold had been conveyed to W. D. by his brothers and sisters, by a

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Stanhope & Co. *vs.* Dodge, *et al.*

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deed dated March 20th, 1854, in which after reciting a partition made by mutual consent between the grantors and W. D. of the real estate devised to them by their father, it was further recited that the land conveyed by said deed had in said partition been allotted to W. D., one of said devisees as his portion of said real estate, but "*charged with the payment*" of certain specified sums to the trustees of his three sisters respectively, for owelty of partition. As a further security for the payment of these several sums, W. D. executed his three several bonds, in favor of the trustees of his said sisters, and on the 12th of July, 1854, conveyed to the same trustees, the same land to secure the payment of the same several sums of money and interest thereon. The interest was paid by W. D. down to July 1st, 1869, but the whole principal and interest from that date remained unpaid, and constituted certain claims allowed in the auditor's account as preferred claims. On exception to these claims, it was HELD:

- 1st. That by the deed of March 20th, 1854, the several sums of money payable to the trustees of the sisters of W. D. were expressly charged upon the land.
- 2nd. That the said charge was not in the nature of a vendor's lien resting only upon the interest or share conveyed by the grantors respectively, but by the terms of the deed it was charged upon the whole estate therein described and which was held by W. D. subject to the charge thereby created.
- 3rd. That the bonds and deed of trust of July 12th, 1854, even if the latter was in all respects valid in law, were mere collateral securities for the same debts, and would not have the effect of impairing the charge created by the deed.
- 4th. That said claims were properly allowed as preferred liens on the fund.

Certain other claims allowed as preferred claims were upon promissory notes of W. D., dated January 24th, 1863, secured by deed of trust made February 14th, 1863, by W. D. and wife, and recorded August 25th, 1869. There was no evidence that it was withheld from record with any fraudulent intent. On exception to said claims it was HELD:

- 1st. That the provisions of the Code relating to the execution and recording of mortgages, are to be construed as referring to deeds of mortgage technically such, and do not apply to deeds of trust such as the deed of February 14th, 1863.

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Stanhope & Co. vs. Dodge, *et al.*

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2nd. That under Art. 24, sec. 19, of the Code, said deed not being a mortgage might be recorded at any time.

3rd. That the saving clause in said sec. 19 in favor of creditors, is not to be construed as applicable only to creditors who may have acquired liens upon the land, but embraces all creditors who come within the terms of the saving clause.

4th. That so far as respects the debts, if any, of W. D. created before the 14th day of February, 1863, the date of the deed, or thereafter created with notice of the deed, these must be postponed to the claims thereby secured, and in the same manner the parties whose claims were secured by the deed were entitled to priority over all creditors who became such after the 25th day of August, 1869, when the deed was recorded.

5th. But as respects the creditors, if any, whose debts were contracted after the date of the deed and before it was recorded, without notice thereof, these if they were merely general creditors who had not acquired liens on the land, were entitled to come in *pari passu* with the parties whose claims were secured by the deed, and to participate with them ratably in the distribution, and if they had acquired liens on the land they were entitled to priority over those in whose favor the deed was made.

Certain other claims which were allowed a preference by the auditor, were based upon promissory notes of W. D., dated January 1st, 1863, in favor of the trustees for his sisters, secured by a deed made by W. D. and wife, on the 16th of February, 1863. The deed was a conveyance to the creditors directly for the purpose of securing the debts due and payable to them, and provided for a release and re-conveyance of the property on payment of the debts secured.

HELD:

That the deed was strictly and technically a mortgage within the meaning of the Code, subject to the provisions therein contained relating to the execution and acknowledgment and recording of such instruments.

The deed was executed and acknowledged before H. R., a Commissioner of Deeds for the State of Maryland, in the District of Columbia, and was recorded on the 26th of August, 1869. An affidavit was made by the grantees "that the several debts mentioned and secured by them in and by the foregoing and annexed deed are justly and *bona fide* owing to them as set forth in said deed." This affidavit was made at the same time that the acknow-

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Stanhope & Co. *vs.* Dodge, *et al.*

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ledgment was made, and before H. R. who had taken the acknowledgment, as Commissioner of Deeds, but the certificate was signed by him, not as Commissioner of Deeds, but with the letters "J. P" affixed to his name. **HELD:**

- 1st. That the affidavit although not in the words prescribed by sec. 29, Art. 24, of the Code, was of equivalent import and effect, and so far as the form of the affidavit was concerned, it was a substantial compliance with the requirement of the Code.
- 2nd. That H. R.'s affixing the letters "J. P." to his name, or calling himself a justice of the peace, did not impair the validity of the affidavit, as it appeared on the face of the paper that he was at the same time a Commissioner for the State of Maryland, and therefore a person before whom the affidavit could lawfully be made.
- 3rd. That said deed being a mortgage, did not come within the provisions of Art. 24, sec. 19, of the Code, and was not entitled to be placed upon record after the expiration of six months from its date without an order or decree of a Court of Chancery for that purpose as prescribed by Art. 16, sec. 23.
- 4th. That the registration of the paper without such order could not have the effect of constructive notice to subsequent purchasers or creditors, and the paper must be considered as a mortgage unrecorded.
- 5th. That being in all respects regularly executed and acknowledged with a sufficient affidavit by the mortgagees, it was valid between the parties, and if made *bona fide* and not withheld from the record for a fraudulent purpose, or in other words, if it was an instrument which a Court of Chancery would order to be recorded under sec. 23, it operated to give to the persons whose debts were thereby secured, priority over all creditors of W. D., whose debts were contracted before its date, and also over all subsequent creditors who became such with actual notice of the deed.

APPEAL from the Circuit Court for Washington County, in Equity.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ROBINSON and IRVING, J.

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Stanhope & Co. vs. Dodge, *et al.*

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*Edward Stake and A. K. Syester*, for the appellants.

*Tryon Hughes Edwards and Wm. Shepard Bryan*, for the appellees.

BARTOL, C. J., delivered the opinion of the Court.

William Dodge, of Washington County, on the tenth day of February, 1877, executed a deed conveying all his property to trustees, with power to sell the same, and to apply the balance of the proceeds, after the payment of costs and commissions, to the payment of all the just debts of the grantor, "without any preference or priority, except such as may have already been obtained by law."

Upon the petition of the trustees, the Circuit Court passed a decree by consent, directing them to proceed in the execution of the trust, and to sell the lands described in the deed. A sale thereof having been made and ratified, the cause was referred to the auditor, who stated an account distributing the proceeds of sale amongst certain preferred creditors. To this account, designated in the record as "*Ac. No. 2*," the appellants, creditors of William Dodge, excepted, and have appealed from the *pro forma* order ratifying the accounts.

The fund in Court was derived from the sale of the land conveyed to William Dodge by the deed dated March 20th, 1854, executed by his brothers and sisters, children of Francis Dodge, deceased; in which it was recited that Francis Dodge died seized of several parcels of land, and by his last will devised all his estate to his children in fee simple and in undivided shares; and that they, "by mutual consent and agreement, made a fair and equal partition of the real estate of their deceased father, among themselves, and upon such partition the tracts and parcels of land hereinafter mentioned were set apart and allotted to William Dodge, one of the said devisees, and party hereto of the second part, to be held by him, his heirs and



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Stanhope & Co. vs. Dodge, *et al.*

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assigns in severalty, *and* his portion of the said real estate; but in order to produce equality among the said distributors in the division of the said estate, *charged with the payment of the following sums of money to the several persons, hereinafter named*, that is to say, the sum of six thousand dollars to the trustees of Mary B. Marbury, the sum of three thousand dollars to the trustees of Emily Dodge, the sum of five thousand four hundred dollars to the trustees of Adeline Lauman," &c.

Said Mary B., Emily and Adeline are children of Francis Dodge, and parties to the deed.

As a further security for the payment of the several sums of money named in the deed, with interest thereon semi-annually, William Dodge, on the first day of January 1854, executed his three several bonds in favor of Francis, Robert P. and Allen Dodge, as trustees of the said Mary B., Emily and Adeline; and afterwards on the 12th day of July 1854, executed a deed of trust, whereby he conveyed to the same trustees the same lands to secure the payment of the same several sums of money and interest thereon.

The interest was paid by William Dodge down to July 1st 1869; but the whole principal, and interest from the last mentioned date, remain unpaid, and constitute claims Nos. 1, 2 and 3 allowed in the auditor's account as preferred claims. The exceptions to their allowance are,

1st. That the bonds are barred by the Statute of Limitations.

2nd. That the deed of July 12th 1854 is to be construed as a mortgage, and that the same is barred by limitation, being of more than twenty years standing, and further that it is defective for the want of an affidavit to the consideration as required by the Code, *Art. 24, sec. 29.*

These several exceptions are not material to be considered, because by the deed of March 20th, 1854, the several sums of money payable to the trustees of Mrs. Marbury,

Emily Dodge and Mrs. Lauman, were expressly charged upon the land. This charge is not in the nature of a vendor's lien resting only upon the interest or share conveyed by the grantors respectively, but by the terms of the deed it is charged upon the whole estate therein described, and which was held by William Dodge subject to the charge thereby created.

In *Johnson vs. Johnson*, 40 *Md.*, 189, the charge created by implication was supported in equity, here it was created by the express words of the deed. There is no ground for asserting that it has been waived or relinquished; no agreement to that effect has been proved. The bonds and deed of trust, even if the latter was in all respects valid in law, upon which we express no opinion, were mere collateral securities for the same debts; and would not have the effect of impairing the charge created by the deed. Taking another security of the same grade does not operate as a waiver or extinguishment of a valid subsisting lien. *Polk vs. Reynolds*, 31 *Md.*, 111; *Brengle vs. Bushey*, 40 *Md.*, 141.

It follows that claims Nos. 1, 2 and 3 were properly allowed as preferred liens on the fund. Claims Nos. 4, 5, 6 and 7 are next to be considered; these were allowed as preferred claims, and paid in full out of the fund. They are upon promissory notes of William Dodge, dated January 24th 1863, secured by deed of trust made February 14th 1863, by William Dodge and wife to Alexander and Allen Dodge, trustees, and recorded August 25th 1869. The land thereby conveyed is the same, from the sale of which the fund distributed in the auditor's account was derived.

The deed was executed in Washington County, District of Columbia, and acknowledged in due form before Henry Reaver, a Commissioner for the State of Maryland. Is the instrument a *mortgage* within the provisions of the Code?

It is very similar in its provisions to the deed which was under consideration in *Charles vs. Clagett*, 3 *Md.*, 82, and which was held not to be a mortgage within the meaning of the Act of 1846 (Code, Art. 24, sec. 29.) That decision, though made by a divided Court has since been followed and approved in *Carson's Adm'r vs. Phelps*, 40 *Md.*, 96; *Snowden vs. Pücher & Wilson*, 45 *Md.*, 260; *Bank of Commerce vs. Lanahan*, 45 *Md.*, 396, and in *The Annapolis and Elkridge Railroad Co. vs. Harrison and Brown*, 50 *Md.*, 490. The result of those decisions is that the provisions of the Code relating to the execution and recording of mortgages, are to be construed as referring to deeds of mortgage, technically such, and do not apply to deeds of trust such as the deed of February 14th 1863. This being so, the only objection to this instrument is that it was not recorded within six months from its date. There is no evidence that it was withheld from record with any fraudulent intent, and under Art. 24, sec. 19, of the Code, not being a mortgage, it might be recorded at any time, and when recorded it has "as against the grantor, his heirs or executors, and against all purchasers with notice of such deed or conveyance, and against all creditors of such grantor and his heirs, who shall become so after the recording of such deed or conveyance, the same validity and effect as if recorded within the time prescribed."

The saving clause in sec. 19, in favor of creditors, is not to be construed as applicable only to creditors who may have acquired liens upon the land, as contended by the appellees; but embraces all creditors who come within the terms of the saving clause.

So far as respects the debts, if any, of William Dodge, created before the 14th day of February 1863, the date of the deed, or thereafter created with notice of the deed, these must be postponed to the claims thereby secured, and in the same manner the parties whose claims are secured by

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Stanhope & Co. vs. Dodge, et al.

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the deed are entitled to priority over all creditors, who became such, after the 25th day of August, 1869, when the deed was recorded.

But as respects the creditors, if any, whose debts were contracted after the date of the deed, and before it was recorded, without notice thereof, these, if they are merely general creditors, who have not acquired liens on the land, are entitled to come in *pari passu* with the parties, whose claims are secured by the deed, and to participate with them ratably in the distribution, and if they have acquired liens on the land, they are entitled to priority over those in whose favor the deed was made.

This rule of distribution results from the construction of *Art 24, sec. 19*, and *Art. 16, sec. 23*, of the Code, and from the adjudged cases. *Pannell & Smith vs. Farmers' Bank*, 7 H. & J., 202; *Sixth Ward Building Association vs. Wilson*, 41 Md., 506; *Dyson, et al. vs. Simmons*, 48 Md., 207.

It does not clearly appear from the record, which, if any of the debts due to the appellants, are entitled to participate in the distribution, nor are all of their claims satisfactorily proved. There is in the record an agreement signed by the solicitors whereby it is provided "that any and all of the creditors and sureties of William Dodge, shall have the right to file their claims in the cause, and have such distribution as they may be entitled to under the law, subject to all exceptions."

In the face of this agreement, we have refrained from passing distinctly upon the several claims of the appellants exhibited in the record. It will be competent for them, when the case shall be remanded, to furnish proof of their claims, and also of the time when the debts due them were contracted, and their respective rights may be determined in accordance with the rule hereinbefore stated.

After the payment in full of the claims to which we have referred, the auditor's account distributed the balance

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Stanhope & Co. *vs.* Dodge, *et al.*

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of the fund ratably to claims Nos. 8, 9 and 10. These arise upon three promissory notes of William Dodge, dated January 1, 1863, in favor of Francis, Robert P. and Allen Dodge, trustees of Emily Dodge, M. B. Marbury and A. Lauman, secured by a deed made by William Dodge and wife, on the 16th day of February, 1863, conveying the same lands before mentioned. This deed was executed and acknowledged before the same Commissioner for the State of Maryland, in the District of Columbia, and was recorded on the 26th day of August, 1869.

This differs from the one dated February 14th, 1863, before considered, in one very material and important particular. The notes therein mentioned were drawn in favor of the trustees, were payable to them, and the deed was executed for the purpose of securing their payment to the grantees.

It is a conveyance to the creditors directly, for the purpose of securing the debts due and payable to them, and though it does not contain a clause of defeasance in the form of a condition, it provides for a release and reconveyance of the property on payment of the debts secured, which is of the same force and effect as the usual condition contained in a mortgage. The power of the mortgagee to sell in case of default, is authorized by the Code, *Art. 64, sec. 5*, to be inserted in any deed of mortgage.

In our opinion, the deed is strictly and technically a mortgage within the meaning of the Code, subject to the provisions therein contained, relating to the execution, acknowledgment and recording of such instruments.

It appears to have been duly acknowledged before a competent officer, an affidavit was made by the mortgagees "that the several debts mentioned, and secured to them in and by the foregoing and annexed deed, are justly and *bona fide* owing to them as set forth in said deed." This affidavit is not in the words prescribed by *sec. 29, Art. 24* of the Code; but it is of equivalent import and effect, and

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Stanhope & Co. vs. Dodge, *et al.*

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so far as the form of the affidavit is concerned, it is a substantial compliance with the requirement of the Code. Was it made before a proper officer? The Code requires it to be made before "any one authorized to take the acknowledgment of a mortgage."

It is objected that it is insufficient, because the certificate is signed "*Henry Reaver, J. P.*," and a justice of the peace in the District of Columbia, is not authorized to take the acknowledgment of a mortgage of land lying in Maryland. It appears, however, upon the face of the paper, that *Henry Reaver*, was a Commissioner for the State of Maryland, as such he took the acknowledgment. On the same day, *Henry Reaver* certifies that the affidavit was made before him. Affixing the letters "J. P." to his name, or calling himself a justice of the peace, does not impair the validity of the affidavit, as it appears on the face of the paper that he was at the same time a Commissioner for the State of Maryland, and therefore a person before whom the affidavit could lawfully be made.

The only objection to the legal validity of the instrument is, that it was not recorded within the time prescribed; being a mortgage, it does not come within the provisions of *Art. 24, sec. 19*, and was not entitled to be placed upon record, after the expiration of six months from its date, without an order or decree of a Court of chancery for that purpose, as prescribed by *Art. 16, sec. 23*. The registration of the paper without such order, could not have the effect of constructive notice to subsequent purchasers or creditors; and the paper must be considered as a mortgage unrecorded. But being in all respects regularly executed and acknowledged, with a sufficient affidavit by the mortgagees, it is valid between the parties, and if made *bona fide*, and not withheld from the record for a fraudulent purpose, or in other words, if it is an instrument which a Court of chancery would order to be recorded under *sec. 23*, it operates to give to the

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Stanhope & Co. vs. Dodge, *et al.*

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persons whose debts are thereby secured, priority over all creditors of William Dodge, whose debts were contracted before its date, and also over all subsequent creditors, who became such with actual notice of the deed.

To the end that the several creditors of William Dodge may be allowed to exhibit and prove their claims, as provided by the agreement contained in the record, and that distribution of the fund in Court may be made among the persons entitled according to the views herein expressed, without affirming or reversing the order of the Circuit Court, the cause will be remanded under Art. 5, sec. 28 of the Code.

It may not be improper to add that in determining the questions of priority among creditors presented by the record, we have treated the fund embraced in the auditor's account, as if it were the only fund arising under the general deed of trust of February 10th, 1877, no question of marshaling assets having been raised or argued by the solicitors.

*Cause remanded.*

(Decided 17th July, 1879.)

ELIZA J. NEAL and STANSBERRY S. NEAL, and others  
vs. MARY C. CHARLTON.

*Administration de bonis non—Effect of a Sale by an Executor who died without Reporting the Sale or Distributing the proceeds—Lapse of Time—Jurisdiction of the Orphans' Court, and Court of Appeals.*

A testator died in the year 1850. His executor qualified as such, and returned an inventory of the estate; afterwards he returned a list of sales, passed an account, and in April, 1853, made distribution of the balance which that account showed to be in his hands. The executor died in the year 1854. In the inventory which had been returned by him was included a parcel of leasehold property, which was not included in the list of sales or in the distribution made by him. In the year 1878, a petition was filed in the Orphans' Court by some of the parties interested in the estate, asking that an administration *de bonis non*, be granted for the purpose of making distribution of said leasehold property. This petition was resisted by the widow of the testator, on the ground that the executor had sold the said property to her and she had paid him for it, and that the claim was barred by lapse of time. On appeal from an order of the Orphans' Court dismissing said petition, it was HELD:

- 1st. That said order regarded as an adjudication by the Orphans' Court, that no administration was necessary or should be granted, was erroneous.
- 2nd. That even if the property had been sold to the widow and paid for by her, this would form no ground for refusing the letters, which were necessary for the purpose of perfecting her title. And if her allegation in regard to the sale were true, it would show an amount for distribution in the late executor's hands, which could be reached in this way more appropriately than in any other.



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Neal, *et al.* vs. Charlton.

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3rd. That the lapse of time interposed no bar to the granting of such letters.

4th. That it was not the province of this Court as the case stood to decide who was entitled to the letters, but that question first belonged to the Orphans' Court.

APPEAL from the Orphans' Court of Washington County.

The case is stated in the opinion of the Court.

The cause was submitted for the appellants, to BARTOL, C. J., BRENT, GRASON, MILLER, ALVEY, ROBINSON and IRVING, J.

*Edward Stake and Lewis C. Smith*, for the appellants.

No counsel appeared for the appellee.

IRVING, J., delivered the opinion of the Court.

In 1850, Jonathan Charlton, of Washington County, died, leaving a will by which he devised one-third of his property, real and personal, to his wife, Mary Charlton, and all the rest and residue of his estate, real and personal, to be equally divided between his son Otho Charlton, his daughters Mary Anne Charlton, Eliza Jane Charlton and Malinda Charlton. He appointed William Corby his executor, who qualified as such and returned an inventory of the estate. Afterwards he returned a list of sales, passed an account, and in April, 1853, made distribution of the balance which that account showed to be in his hands. In 1854, Corby died. In 1878, the appellants filed a petition in the Orphans' Court of Washington County, setting out the facts hereinbefore stated, and filing copies of said inventory, and list of sales, and his account and distribution which form a part of this record. It also

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Neal, *et al.* vs. Charlton.

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charges that said Jonathan Charlton left, as part of his personal estate, certain leasehold property in the town of Williamsport, in Washington County, which was appraised and returned in the inventory of said executor, the same being an unexpired portion of a lease for ninety-nine years, and alleges that said leasehold property had never been sold by said executor, nor divided in any way among the legatees, but remained undisposed of until this time, and filed with the petition, a copy of the instrument by which the testator acquired the property, a copy of which is also in the record. The petition also states that Mary Anne Charlton and Otho Charlton had both died without children or descendants, and that Eliza Jane Charlton had intermarried with Stansberry S. Neal, one of the petitioners, and Malinda<sup>o</sup> Charlton had married Robert Cottrell, and that the widow and all the parties lived in Washington County.

The petition further alleged, that no further administration of the estate had been granted since the said executor's death, and alleged that such administration *de bonis non* ought to be granted; and further stated that Thomas Charlton, the oldest child of the testator, was applying for such administration, and prayed process against said Thomas Charlton, the said widow and the other parties to bring them in that they might abide such order as the Court might pass. None of the parties answered, except Mary C. Charlton, the widow, who admitted all the facts alleged, except that the respondent insisted the executor had sold the property to her, and she had paid him for it, and it could not be pursued in this way; and insisted that the claim was stale, and after so long a time the Court would presume the payment of debts and legacies, and that the petition should be dismissed. She also claimed that, if administration *de bonis non* was granted, it should be granted to her. The Orphans' Court dismissed the petition, and appeal having been taken to this Court, the

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Neal, *et al.* vs. Charlton.

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only question is, should the petition have been dismissed, or should letters of administration have been granted to some one? In the order dismissing the petition, the Court refused to grant letters to Thomas Charlton, and their order in that regard forms no ground of appeal, and is not relied on, for he was not first entitled, and the petition did not ask his appointment; it only stated his application as a fact, and prayed process against him. The object of the petition was to secure the granting of letters to somebody, and we understand the dismissal of the petition, with costs upon petitioners, without granting letters in accordance with its seeking, to be an adjudication by the Court that no administration was necessary or should be granted. This determination of the matter by the Court we think was erroneous. By numerous decisions of this Court it has been long established, that when an executor or administrator dies, without having made full administration and full distribution of the assets, administration *de bonis non* is necessary; and that the title of the distributees cannot be made in any other way. *Salisbury vs. Black*, 6 H. & J., 297; *Haslett vs. Glenn*, 7 H. & J., 23; *State vs. Wright*, 4 H. & J., 148; *Alexander vs. Stewart*, 8 G. & J., 226, and many others, the latest being *Smith vs. Doe, ex dem. Dennis*, 33 Md., 442.

It is not denied that this leasehold property was included in the inventory and appraisement, and does not appear to have been sold or accounted for in any subsequent proceedings in the Orphans' Court; but the respondent alleges that the administrator sold the property to her, and she paid him for it; and insists that it cannot now be pursued by a new administration. There is nothing in the record to prove this claim on the part of the respondent to be true; and if there were it would form no ground for refusing letters. Such letters are necessary for the perfection of her title, if she is entitled to have it perfected, and if true it shows an amount for distribution

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Neal, *et al.* vs. Charlton.

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in the late executor's hands, which can be reached in this way, more appropriately than in any other.

In *Grimes and wife, et al. vs. Talbert and wife, et al.*, 14 *Md.*, 172 and 3, the present Chief Judge of this Court says in delivering the opinion in that case, that "it was not the design of the statute to try the title to personal property in this summary way." So that administration *de bonis non* is necessary to the settlement of the question of title thus set up in the answer as proceeding from the late executor. In the case last quoted, it is also settled that lapse of time interposes no bar to the granting of such letters. Twenty-eight years had elapsed in that case from the death of the decedent to the application for letters. In reversing the order of the Orphans' Court, we do not decide, nor is it our province at this time to decide, who is entitled to have the letters. That question first belongs to the Orphans' Court. We only decide that they erred in not granting letters of administration *d. b. n. cum testamento annexo* to some one, and in dismissing the petition without granting such letters as it sought, and therefore we shall reverse their order dismissing the petition, and shall remand the case, to the end that letters of administration *de bonis non cum testamento annexo* may be granted to such person as the Orphans' Court may think entitled to them.

*Order reversed with costs,  
and cause remanded.*

(Decided 17th July, 1879.)

## CHARLES WEBER vs. FREDERICK FICKEY, JR.

*Action against a Stockholder under sec. 52, of Art. 26 of the Code—Construction of sec. 5 of the Act of 1868, ch. 471—Effect of failure to comply with the requirements of said said section—When a case is ready for Trial when sent back under the eighth Rule of the Court of Appeals—Construction of fourteenth Rule of the Superior Court of Baltimore City relating to Bills of Particulars—Variance—"Junior" no part of a person's name—Admissibility of Parol proof of the Organization of a Corporation, and of the issue of Stock—Sufficiency of Evidence—Sec. 57 of the Act of 1868, ch. 471, Directory merely—Sufficiency of averment in Narr. as to the payment for Stock—Defective prayer—Statement of a Witness not Conclusive as against his own Evidence—Estoppel—Certain proof held to be unnecessary in an Action against a Stockholder under the Personal Liability clause.*

W., a stockholder in a private corporation was sued by F., also a stockholder, for the recovery under sec. 52, of Art. 26 of the Code, of the amount of a judgment which F. had recovered against the corporation. The defendant pleaded as a bar to the action, that F. as president of the corporation, did not keep a full, fair, and correct account of the transactions of the corporation as required by sec. 5 of the Act of 1868, ch. 471. That section requires that the *President and directors* shall keep "full, fair and correct accounts of their transactions," and shall annually prepare "a full and true statement of the affairs of the corporation, which shall be certified to by the president and secretary, and submitted at the annual meeting of the stockholders." On demurrer, it was **Held**:

1st. That even if the failure to comply with the provisions of said fifth section was owing entirely to the conduct of the President of the corporation, it could not have the effect of releasing either the corporation or its stockholders from the liabilities which the law had imposed upon them for the debts which it had contracted.

2nd. That the facts stated in the plea may have been true, and yet they did not constitute a bar to the plaintiff's recovery.

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Weber vs. Fickey.

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Under the eighth Rule of the Court of Appeals, the case was sent back to the Superior Court of Baltimore City, was placed upon the trial docket of that Court, was on the 10th day of September, marked for trial at the regular call of the docket, and was reached on the 30th day of November following, and was then called for trial. The Court below then required the trial to be proceeded with. On appeal by the defendant it was HELD:

That this was ample notice to the defendant, and the Court below was right in requiring the trial to be proceeded with.

A demand for a bill of particulars was made in the Superior Court after the trial had begun, and after a former demand had been complied with, which compliance the Superior Court decided, was a satisfaction of the demand. By the fourteenth rule of that Court, it is provided that "if the declaration shall not disclose the particulars of the plaintiff's demand, the defendant at any time before the cause shall have been entered on the trial docket, or afterwards with leave of Court, may enter on the docket a demand of particulars of the claim or demand," &c. HELD:

That even if no former demand had been made and satisfied, the demand came too late under the rule of Court.

The judgment sued upon was recovered by F., Junior, while the amended *narr.* in this case named the plaintiff as F. It was nowhere alleged or proved that there were two persons bearing the name of F. so as to make the addition of "Junior" necessary to distinguish the one from the other. On objection it was HELD:

That there was no such variance as to make the record of the judgment inadmissible in evidence.

It appearing that either no written evidence of the organization of the corporation ever existed, or that if it did, the writing had been lost, it was HELD:

1st. That in this state of the case, parol evidence of the organization was clearly admissible.

2nd. That entries in the stock book, and parol evidence offered in connection therewith, were admissible for the purpose of proving that the plaintiff was the owner of shares of stock fully paid up at the time he became a creditor of the corporation, and that the defendant at that time was the owner of stock which had not been fully paid for.

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Weber *vs.* Fickey.

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The record in an equity proceeding was offered to show that D. & Son as mortgagees, had sold certain marble quarries to H., and that the corporation had been substituted as purchaser in the place of H. Receipts were offered of payments by the corporation to D. & Son, on account of the mortgage, and it was proven that 440 shares of the paid up stock of the corporation was issued to H. as the consideration of his agreeing that the corporation should be substituted as purchaser of the mortgaged premises. On exception to a prayer on the ground that there was no evidence tending to prove that there was any agreement that the corporation would accept from H. his interest in the quarries and pay all encumbrances thereon held by D. & Son, it was HELD:

That the above evidence tended to prove that there was such an agreement.

On objection that the plaintiff was not entitled to recover because the President and directors of the corporation had not kept books, "so as to show at all times fully what property was received for said stock, at what value, and the number of shares of the capital stock issued for the same," as required by the 57th section of the Act of 1868, ch. 471, it was HELD:

That this provision of said section is directory merely, and not essential to the validity of a subscription to the capital stock payable in property.

It was further HELD:

1st. That as the *narr.* alleged that the shares of the plaintiff had been fully paid for, it was not necessary to allege *in what manner* they had been paid for, but the mode of payment was properly to be shown by the proof.

2nd. That a prayer was bad because it assumed that a statement made by a party, was conclusive even as against his own positive evidence.

3rd. That after issuing the 440 shares of stock to H., and becoming liable to pay the purchase money for the quarry property as substituted purchaser, and receiving the property from H. neither the corporation nor a stockholder could be permitted to escape responsibility by showing that more was paid for the property than it was actually worth.

4th. That it was not necessary in this action for the plaintiff to show what were the interests purchased by the corporation in the quarry property.

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Weber vs. Fickey.

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APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*First Exception.*—Stated in the opinion of the Court.

*Second Exception.*—Stated in the Court's opinion, except that the rule of the Superior Court on which the decision of this exception is based, is not there stated. Said rule is as follows :

14. "If the declaration shall not disclose the particulars of the plaintiff's demand, the defendant at any time before the cause shall have been entered on the trial docket, or afterwards with leave of Court, may enter on the docket a demand of particulars of the claim or demand ; and if such demand be made before plea pleaded, the rule to plead shall be enlarged to fifteen days after filing of the bill of particulars and service of a copy thereof on the defendant."

*Third, fourth, fifth, sixth, seventh and eighth exceptions,* sufficiently stated in the opinion of the Court.

*Ninth Exception.*—At the trial the plaintiff offered the following prayers :

1. If the jury shall find from the evidence in the case, that the Baltimore County Marble Company was incorporated under the General Laws of the State, as offered in evidence, on or about the 11th day of November, 1870, and that a few days thereafter, a general meeting of the incorporators and stockholders was called and assembled, for the purpose of organizing said corporation, and considering the propriety of receiving the subscription of a certain Charles T. Holloway to the stock of said corporation, in property suitable and necessary to the business and objects of said corporation, and that said corporators and stockholders then and there organized said company, and agreed with said Holloway to accept from him all his interest in certain stone quarries, mines and property owned by him, and situated in Baltimore County ; said corporation to pay all encumbrances thereon, held by a



certain Denmead and Son, and in addition thereto, to transfer to said Holloway, 440 shares of full paid up stock of said Baltimore County Marble County ; and they shall further find that the said 440 shares of stock were issued and delivered to said Holloway or to Anne H. Holloway, his wife, with his consent and approbation, and that the said corporation under said agreement took immediate possession of said mines, quarries and property, and continued to use and occupy the same in mining and quarrying stone, and in carrying on the business of said corporation for over a period of one year, and during the entire period of the active existence of said corporation, then the holder of the said 440 shares of the capital stock of said corporation, or any part thereof, was not and is not liable for any of the debts, contracts or obligations of said corporation as an unpaid up stockholder.

2. If the jury shall find the facts set out in the foregoing prayer, and shall further find that ten shares of said stock were, on or about the 30th of January, 1871, transferred and issued to Frederick Fickey, Jr., the plaintiff in this case, and is the only stock held by said Fickey in said company, then the said Fickey was and is in no way responsible thereby to any of the creditors of said corporation, for any of the debts or contracts of said corporation created during the time he was such holder.

3. If the jury shall find the facts set out in the two preceding prayers, and shall further find that the Baltimore County Marble Company became and is indebted to the plaintiff in the amount sued for in this case, or in such part thereof as they may find, and at the time of the creation of the said indebtedness, the defendant was a stockholder in said corporation of fifty shares of stock, upon which the whole par value has not been paid, then the said defendant is liable to the plaintiff to the amount of such unpaid subscription, less whatever sum the jury may find has been paid by Weber in the suit of *Hurt v. Weber*,

in the Circuit Court for Howard County; provided the amount so found to be due on account of defendant's unpaid subscription shall not exceed the sum which the jury may find is due from the said company to the plaintiff.

4. If the jury shall find that some time in the month of October or November, 1871, certain stock of the Baltimore County Marble Company was transferred by Fickey to Green, and shall further find that the same was held by Fickey (all except ten shares) as collateral security for money loaned by him to a certain John Robinson, then the said Fickey was under no liability to the creditors of said corporation at any time during the holding of said stock, growing out of the fact that the full par value of the same had not been paid up.

The defendant objected to the granting of the plaintiff's first prayer, because there was "no evidence that said company agreed with said Holloway to accept from him all his interest in certain stone quarries, mines and property owned by him, and situated in Baltimore County, said corporation to pay all encumbrances thereon held by Denmead & Son;" and because "it submitted to the jury the question of law, if the company be duly incorporated."

The defendant offered the following prayers:

1. That the transcript of the record of the judgment offered in evidence is variant from the judgment averred in the declaration in this, that the judgment offered in evidence purports to be in favor of one Frederick Fickey, Jr., whereas the judgment averred in the declaration purports to be in favor of Frederick Fickey, and therefore the plaintiff cannot recover.

2. That the plea of *nul tiel record* must be found by the Court in favor of the defendant, because of the variance mentioned in the first prayer.

3. That the plaintiff, to maintain his action at law, must show himself exempt from suit by creditors of the corporation, and that the evidence offered in this cause tending

to show that he was the holder of stock paid by land and other property, is not legally sufficient in an action by a creditor, to exempt the plaintiff from liability for the debts of the corporation at the suit of a creditor of the corporation.

4. That to entitle the plaintiff to recover in this form of action, the burden rests upon him to show that the stock is fully paid up, and there is no averment in the declaration to support the proof offered tending to show that the plaintiff held the stock as assignee of Holloway, and that said stock was fully paid up by land or other property, and unless the jury find from all the evidence that Fickey paid up his stock, their verdict must be in favor of the defendant.

5. That the jury are not at liberty to consider the evidence, tending to prove that Holloway purchased by a written agreement the right to quarry marble for several years, by a payment of royalty upon a certain farm in Baltimore County; that subsequently one Denmead took a mortgage of said right to quarry marble, and to secure the value of certain improvements made by himself, of about \$8000, from said Holloway & Denison; that said mortgage was foreclosed in default of payment, that said Holloway became the purchaser at the mortgage sale, that subsequently the Baltimore County Marble Company of Baltimore County became substituted as purchaser instead and place of said Holloway; that the company then executed a mortgage to pay the balance of the purchase money, and although the jury may find that at a certain meeting of the managers and directors of the company, it was agreed that 440 shares should be given to the said Holloway as paid up stock; that this is not evidence sufficient to authorize them to find that the said 440 shares alleged to have been given to Holloway, was paid up stock; that the said alleged agreement between the said directors and managers, and the said Holloway, to give

unto said Holloway \$44,000 in capital stock, was void as against creditors, without authority of law, and no legal proof of compliance with the provisions of the statute, requiring stock to be fully paid up, so as to exempt the holder of such stock from personal liability; and if they further find that the 10 shares alleged to have been issued to the plaintiff, were a portion of said 440 shares of said Holloway's stock, and that the plaintiff has made no other payment upon said 10 shares, then there is no sufficient proof that the plaintiff has fully paid up his stock, and their verdict must be in favor of the defendant.

7. If the jury shall believe the testimony of the witness Green, that the plaintiff sold him 140 shares of stock; and if they also find, that but 100 of said shares was hypothecated to said Fickey by Robinson, then in the absence of any evidence tending to show that the remaining 40 shares had not been paid for in full, their verdict must be in favor of the defendant.

8. That the Court exclude from the consideration of the jury the following testimony of Fickey, admitted subject to exception: "Mr. Holloway proposed to assign his claim on the property, in consideration of the issue of 440 shares of paid up stock; a meeting was held to consider this proposition, it was accepted; Holloway was to assign to the company all his interest in the quarries and other property in Baltimore County;" the stock of Holloway was full paid up stock.

9. That the interest purporting to be conveyed by the mortgage, which was foreclosed, was a leasehold interest and not land, as required by the organic Act, and the other interest merely chattels; that such an interest could not gratify the requirements of the statute permitting land and other property to be taken in payment of stock.

10. That if the jury find from the evidence, that the plaintiff stated to the defendant, that he was the subscriber of 100 shares of the capital stock of the company,

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Weber vs. Fickey.

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and if the jury find that there was no payment of said stock, then their verdict must be in favor of the defendant.

11½. (To the Court.) That the alleged agreement to be substituted as purchaser, in consideration of the payment of the purchase money of \$10,000, or thereabouts, and the issual of stock to the extent of 440 shares, when the actual value of the interests sold by public auction is shown to have been but \$10,000, could not by any agreement or arrangement between stockholders, be taken to be worth the value of 440 shares of full paid stock, so as to constitute payment in full of stock under the personal liability section of the Act.

12. That there is no evidence legally sufficient to show that an agreement, bargain or contract was made with Holloway by the Company, to give 440 shares of stock, in consideration of the substitution of the company as purchaser of the property in question.

13. That if the jury shall find for the plaintiff, then they shall deduct from said sum the amounts, \$580, \$46.80 and \$64.01.

14. That the Court exclude from the jury the record of Denmead & Son against Denison & Holloway, because the same is defective, irregular and incompetent evidence under the issues joined in this cause.

15. That there is no evidence tending to show what the leasehold interest sold under the record proceedings of Denmead & Son was, and that it is necessary to produce the lease thereof, in order to show that any interest in lands was thereby conveyed.

16. That the credibility of plaintiff's testimony is for the jury, and if they believe from all the evidence that the ten shares of stock issued to the plaintiff was original stock, and not assigned by Anne H. Holloway, and if they further find that the plaintiff has not paid for said stock, then their verdict must be in favor of the defendant.

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Weber vs. Fickey.

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17. That by the terms, "other property," the articles enumerated in the mortgage contained in the record of Denmead & Son against Holloway & Denison, are not embraced, and such articles cannot, under the statute, be regarded as payment in full of the capital stock, so as to exempt the stockholders from personal liability.

The Court (DOBBIN, J.) granted the plaintiff's prayers, and refused those of the defendant, except the sixth and eleventh which were withdrawn, and the thirteenth which was conceded.

The defendant excepted, and the verdict and judgment being against him he appealed.

The cause was argued originally before BARTOL, C. J., STEWART, GRASON, MILLER and ALVEY, J. On the re-argument on notes, it was submitted to BARTOL, C. J., BRENT, GRASON, MILLER and ALVEY, J.

*John Henry Keene, Jr.*, for the appellant.

*Thomas M. Lanahan*, for the appellee.

GRASON, J., delivered the opinion of the Court.

This cause was argued and decided at April Term, 1878, and upon motion of the appellee was ordered to be re-argued on notes, and the case has been again carefully considered. The suit was instituted by the appellee, a stockholder and creditor of the Baltimore County Marble Company of Baltimore County, against the appellant, also a stockholder in the same company, for the recovery, under sec. 52 of Art. 26 of the Code, of the amount of a judgment, which the appellee had recovered against the corporation in the Circuit Court for Baltimore County. The declaration, as originally filed, contained two counts, the second of which was held insufficient on demurrer. An amended *narr.* containing a single count was then

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Weber vs. Fickey.

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filed, to which there was also a demurrer, which was overruled. The defendant then filed twenty-two pleas, to the fourteenth, fifteenth, twentieth and twenty-second of which the plaintiff demurred, and the demurrer was sustained. During the progress of the trial nine exceptions were taken by the defendant, the last of which was to the granting of the appellee's prayers, and to the rejection of all the prayers offered by the appellant, except the thirteenth which was conceded, and the sixth and eleventh which were withdrawn. We shall consider these exceptions in the order in which they were taken; and first the demurrer. This case was before this Court at the April Term, 1877, when the judgment was reversed because the declaration was defective in not alleging that the plaintiff had fully paid his subscription to ten shares of the capital stock of the corporation held by him, and further, because it did not charge that the defendant was a stockholder *at the time* the debt to the plaintiff was incurred by the corporation. The declaration in this case contains both allegations, and is in all other respects formal and sufficient, and the demurrer was, therefore, properly overruled. The counsel for the appellant admitted, at the argument of this cause, that the demurrer to his fourteenth, fifteenth and twenty-second pleas was well taken; but contended that his twentieth plea was good, and that the demurrer to it ought not to have been sustained.

The twentieth plea was pleaded as a bar to the action upon the ground as therein alleged, that the appellee as President of the Marble Company did not keep a full, fair and correct account of the transactions of the corporation as required by the fifth section of the Act, and because the appellee was President during the time the debt was contracted by the corporation. Section 5 of the Act of 1868, ch. 471, requires that the *President and directors* shall keep, "full, fair and correct accounts of their transac-

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Weber vs. Fickey.

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tions," and shall annually prepare "a full and true statement of the affairs of the corporation, which shall be certified to by the President and Secretary, and submitted at the annual meeting of the stockholders." Admitting for the sake of the argument, that the failure to comply with the provisions of the fifth section was owing entirely to the conduct of the President of the corporation, the appellee in this case, it could not have the effect of releasing either the corporation, or its stockholders from the liability which the law had imposed upon them, for the debts which it had contracted.

The facts stated in the plea may have been literally true, and yet they did not constitute a bar to the plaintiff's recovery. But the plea alleges that the *plaintiff* refused to keep an account and make the certificate, while the law imposes that duty, not on the plaintiff, but upon the *President and Directors*, and without the co-operation of the *directors*, the President of the corporation had no power or authority to perform either of the duties required by the fifth section.

We are of opinion that the demurrer to the twentieth plea, was, therefore, properly sustained.

The first exception was taken to the refusal of the Superior Court to postpone the trial of the cause, on the ground that thirty days notice had not been given before trial, as provided by sec. 16 of Art. 5 of the Code. That section relates to cases in which a writ of *procedendo* is awarded by the Court of Appeals. Under the eighth rule of that Court, passed under authority given by the Constitution *no procedendo* now goes, but when the judgment appealed from is reversed, a new trial is awarded, and the case is sent back and goes upon the trial docket of the Court below.

This case was sent back under said rule to the Superior Court of Baltimore City, was placed upon the trial docket of that Court, was on the 10th day of September marked



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Weber vs. Fickey.

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for trial at the regular call of the trial docket, and was reached on the 30th day of November following, and was then called for trial. This was ample notice to the defendant, and the Court below was right in requiring the trial to be proceeded with. We find no error in the ruling of the Court below in the second exception. The demand for a bill of particulars was made after a former demand had been complied with, which compliance the Court below decided was a satisfaction of the demand, and after the trial had begun. Even if no former demand had been made and satisfied, this demand came too late under the rules of that Court. The third exception was taken to the admission in evidence of the certificate of incorporation. This exception was abandoned at the argument, and we could not notice it further than to say, that the certificate is in conformity with the requirements of the law, and was clearly admissible as evidence.

The fourth exception was taken to the admission in evidence of the record of the judgment recovered by the appellee against the Marble Company. The only ground of objection urged against its admissibility is, that the record of the judgment shows that it was recovered by Frederick Fickey, Jr., while the amended *narr.* in this case names the plaintiff as Frederick Fickey. It was contended that this is such a variance as to make the record inadmissible. It is nowhere alleged or proved that there are two persons bearing the name of Frederick Fickey, so that the addition of "Jr." was necessary to distinguish the one from the other. It has been held in various cases, that "Jr." is no part of a man's name. We refer only to *Headley vs. Shaw*, 39 *Illinois Reps.*, 354; *State vs. Weare*, 38 *N. H.*, 314; *Cobb vs. Lucas*, 15 *Pick.*, 7. The record of the judgment was properly admitted. From what we have said with respect to this exception, it necessarily follows that the first and second prayers of the appellant were rightly refused. The

appellee then proved that the corporation was in existence on the 11th day of November, 1870, and that he was present and presided; that he kept no record of the proceedings, but supposed that Miller, the secretary did; had asked Miller for it, who could not find it; had inquired for it, and was told that it was lost. That all the incorporators and stockholders were at the meeting, which was called a few days afterwards, for the purpose of organization, and that Miller was there as secretary. Miller being then called by the Court, testified that he was not at that meeting, and was not then secretary; that afterwards he was secretary, but that no books ever came into his hands, but that the books were kept from him, and was sure they were kept by Fickey. That the books contain his, Miller's writing, but that he saw no books of the organization, and that he did not know of any record. Fickey then testified that he knew of no record of the organization, and did not know that one was kept. Proof was then offered by him that a meeting was called for the purpose of organization and considering Holloway's proposition, and that Holloway proposed to sell the property, that he, Fickey, was elected President, and was directed to issue 440 shares of full paid up stock, in consideration of Holloway's assigning all his interest in the quarry in Baltimore County, which was accordingly done. This proof was objected to as inadmissible, but the Court overruled the objection, and admitted the evidence, and this ruling forms the subject of the fifth exception. It appears that either no written evidence of organization ever existed, or that if it did, the writing had been lost and could not be found, and in this state of the case, the evidence objected to was clearly admissible, and the ruling of the Court below, on this exception, is affirmed. The appellee further proved that the subscribers to the stock signed no paper; that the stock book from which the certificates were issued, was

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Weber vs. Fickey.

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the only writing kept in relation to stock. The book from which the certificates were issued, was then handed to the witness, who read from it entries, showing that fifty shares of stock had been issued to the appellant; and then further testified that said book showed the number of certificates of shares issued, and to whom; that the appellant paid five hundred dollars on account of the shares issued to him, that the balance remained unpaid, and payment thereof had been frequently demanded. That witness could not say that the appellant was the owner of the stock at the time he was testifying, but that he was owner all the time the advances were made by the witness. That on January 30th, witness became the owner of ten shares of the stock, which had been issued to Holloway, and then read the entry in the stock book to show that he had thus become the owner of the ten shares of said stock. The appellant objected to the admission of all said evidence, beginning with the words, "he was owner," but the evidence was admitted and he took his sixth exception to this ruling. This evidence was most material to the appellee's recovery, which depended upon his proving that he was the owner of shares of stock fully paid up at the time he made the advances to the corporation, and also that the appellant at that time was the owner of stock which had not been fully paid for. We cannot perceive in what manner these facts could have been proved, except by the production of the stock book and the parol evidence offered in connection therewith, we can discover no objection to its admissibility. At the time Holloway offered his property in payment of subscription to stock, and the corporation agreed to take it, it appears from the record, that there was an equity suit pending in the Circuit Court for Baltimore County, in which Denmead and Davis, trading as Denmead & Son, mortgagees, had sold the quarry property in Baltimore County to Holloway, and that under the agreement

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Weber *vs.* Fickey.

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between the parties to the suit and the Marble Company, the latter was substituted as the purchaser in the place of Holloway. The record of said equity case was offered in evidence, for the purpose of showing a transfer of Holloway's interest in the quarry property to the Marble Company, certain receipts for payments made on account of the purchase were also offered in evidence, and were objected to by the appellant. The objections were overruled, and the record and receipts admitted, and these rulings form the subjects of the seventh and eighth exceptions respectively. We cannot discover any valid objection to the proofs offered in these exceptions, and the rulings of the Court below upon them are affirmed. At the close of the evidence, the appellee presented four prayers, which were granted, and the appellant seventeen, of which the thirteenth was conceded, the sixth and eleventh were withdrawn, and all the others were rejected, and to the granting of the appellee's prayers, and the refusal of those offered by the appellant, the latter took his ninth exception. The appellee's first prayer was specially excepted to, on the ground that there was no evidence tending to prove that there was any agreement that the Marble Company would accept from Holloway, all his interest in certain stone quarries in Baltimore County, and pay all encumbrances thereon held by Denmead & Son. The receipts of payment to Denmead & Son from the Marble Company, on account of the mortgage executed by Holloway and John M. Dennison were in evidence. This mortgage was the foundation of the equity proceedings, the record of which was offered in evidence, and that record proved that the Marble Company was substituted in place of Holloway as the purchaser of the premises thus mortgaged, and the receipts show that payments were made by the corporation on account of the mortgage, and the proof offered by the appellee, proved that 440 shares of paid up stock of the corporation was issued to Holloway, as the considera-

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Weber *vs.* Fickey.

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tion of his agreeing that the corporation should be substituted as purchaser of the mortgaged premises. All this proof was in the case and tended to prove that there was an agreement that the Marble Company would accept from Holloway, all his interest in certain stone quarries in Baltimore County, and pay all encumbrances thereon, held by Denmead & Son. There was, therefore, proof to sustain this prayer. But it was contended that the appellee was not entitled to recover, because the president and directors of the corporation had not kept books, "so as to show at all times fully what property was received for said stock, at what value and the number of shares of the capital stock issued for the same," as required by the 57th section of the Act of 1868. From a careful examination of sections 56 and 57 of the Act, we think it clear that this provision of the latter section is *directory* merely, and not essential to the validity of a subscription to the capital stock, payable in property. In such a case, the owner of the property conveys the property, and the corporation issues the stock to him, and the contract thus becomes an executed contract. The failure of the corporation to keep a book, showing the particulars of such a transaction cannot invalidate it. When the contract is executed by a transfer of the property and the issue of the stock, the corporation is estopped from setting up the invalidity of the contract. *Oil Creek and Allegany R. R. Co. vs. Penn. Transportation Co.*, 83 *Penna. Reps.*, 160; *East N. G. and Jamaica R. R. Co. vs. Lightall*, 5 *Abb. Pr. N. S.*, 458; *Smith vs. Sheely*, 12 *Wall.*, 358.

It may be further remarked that it appears that the appellant was one of the directors or managers of the corporation during the time these transactions took place, and is therefore as much in default in not having the books kept, as directed by the 57th section, as is the appellee. The appellee's four prayers put the law of the case correctly and fairly to the jury, and submitted to them all the

facts necessary to be found by them, to establish the appellee's right to recover, and they were properly granted. The appellant's first and second prayers have been disposed of by what we have said with respect to the fourth exception. His third prayer asks an instruction that the evidence offered to show that the appellee held stock paid for by land or other property, is not legally sufficient to exempt him from liability for the debts of the corporation at the suit of a creditor of the corporation. We have already stated that, if the stock held by the appellee was part of the same stock which had been issued to Holloway in consideration of his interest in the stone quarries which had been transferred to the corporation, then he was liable, as stockholder, to the creditors of the corporation. The appellant's third prayer is also in direct conflict with the appellee's prayers, which, we have stated, were properly granted. His fourth prayer relies upon the fact that there was no averment in the *narr.* to support the proof offered tending to show that the ten shares of stock held by the appellee had been paid for by land or other property. The *narr.* does allege that these ten shares had been fully paid for and it was not necessary to allege *in what manner* they had been paid for. The mode of payment was properly to be shown by the proof. This prayer was therefore properly rejected. The fifth prayer was also properly rejected because it seeks to exclude from the consideration of the jury evidence, which, in considering the exceptions to evidence, we have said was properly admissible. The sixth prayer having been withdrawn is omitted from the record, and is not therefore before us for consideration. The seventh prayer is based upon the evidence of Thomas M. Green, who testified that he had bought one hundred and forty shares of the stock of the Marble Company from the appellee, while the latter testified that he had sold but one hundred shares, but that all the shares which he did sell to Green had been held by him only as collateral

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Weber vs. Fickey.

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security for a debt due him by Robinson, and there was no evidence whatever offered tending to show that the shares so transferred to Green, were not so held. For this reason the seventh prayer was also rightly refused. The eighth prayer was properly rejected for the same reasons we have given to show that the evidence in the fifth exception was admissible. The ninth prayer was rightly refused because under the Act of 1868, chap. 471, sec. 56, subscriptions to stock may be paid *in land or other property*. The tenth prayer was also rightly rejected, because it assumes a statement made by a party is conclusive even as against his positive evidence. The prayer, numbered eleven and a half, states as a proposition of law that the agreement to be substituted as purchaser, in consideration of the payment of the purchase money of \$10,000 or thereabouts, and the issual of stock to the extent of 440 shares could not by any agreement or arrangement of stockholders, be taken to be worth the value of 440 shares of full paid stock, so as to constitute payment in full under the personal liability clause of the Act, because the actual value of the interest sold at public auction is shown to have been but ten thousand dollars. To this it may be answered that Holloway had paid part of the purchase money at the time the corporation was substituted as purchaser, and also, that the stockholders may have supposed that Holloway's interests in the quarry property were worth much more than ten thousand dollars. But whether this be so or not, after issuing the stock and becoming liable to pay the purchase money and receiving the property from Holloway, neither the corporation nor a stockholder can be permitted to escape responsibility by showing that more has been paid for the property than it were actually worth. This prayer was therefore properly rejected. The twelfth prayer was rightly refused. There is not only evidence of an agreement to give Holloway 440 shares of stock for being substituted as purchaser of the property, but the

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Weber vs. Fickey.

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evidence shows that the agreement was actually executed by issuing that number of shares of stock to him. The fourteenth prayer was also properly refused for the reasons we have assigned for the admission of the record of the equity proceedings, when considering the eighth exception.

It was not necessary for the appellee to produce in evidence the lease under which Holloway held the quarry property. It is to be presumed that the stockholders of the Marble Company informed themselves, before purchasing, as to the interests in the property held by Holloway as purchaser at the sale of the mortgaged premises, and in this suit it was not incumbent on the appellee to show by proof what those interests were. The fifteenth prayer was therefore rightly rejected. The sixteenth prayer assumes the fact that ten shares of stock were issued to the appellee when that question should have been submitted to the jury. Besides this there was no evidence offered tending to prove that said shares were original stock; the only evidence in regard to said shares being that they were part of the stock issued to Holloway in consideration for his interest in the land transferred to the corporation. With respect to the seventeenth prayer it is only necessary to say that there is no proof that any "other property" than Holloway's interest in the land was received by the stockholders in payment of his subscription to the 440 shares of stock issued to him, and therefore this prayer was properly refused. There was also a motion in arrest of judgment filed in the Superior Court, which was overruled. No point was made in the appellant's brief or argument in this Court, nor does it appear upon what ground it was based, and we can find no valid ground for it in the record. Finding no error in the rulings of the Superior Court in the various exceptions set out in the record, the judgment appealed from will be affirmed.

*Judgment affirmed.*

(Decided 17th July, 1879.)



In the Matter of the Trust Estate of WOODS, WEEKS & COMPANY. APPEAL OF WILLIAM H. PEROT, Trustee, and others. APPEAL OF ROBERT GARRETT & SONS. APPEAL OF DREXEL, MORGAN & Co. APPEAL OF JOSHUA G. HARVEY.

*Contracts by an Importing firm with their Bankers, who held Liens on certain Cargoes for Acceptances under Letters of credit—Pledge of Collateral securities, including the Firm's notes—Power to Bankers to sell on failure of Pledgors to put them in Funds to meet acceptances—Deed of Trust for the benefit of Creditors—Validity of the Contracts—Sale of the Firm's notes by the Bankers, and Application of the Proceeds in part payment of the Acceptances—Right of the Bankers to prove under the Trust deed for the Balance of their claim—Right of the Purchasers of the Notes to prove under the Deed for their full amount—Such right not affected by the fact that the Notes were purchased after Maturity—Rights of the Bankers under the Contracts not impaired by the Failure and insolvency of the firm, and the execution of the Deed of Trust—Right of a Debtor, apart from the Insolvent or Bankrupt laws, to prefer, in good faith, one Creditor to another—Restrictions upon the Right of parties to Contract.*

An importing firm in order to obtain possession of several cargoes as they arrived, made contracts with their bankers, who held liens on the cargoes for acceptances under letters of credit, by which they pledged collateral securities, with power to the bankers to sell the same at any time, in case the firm failed to put them in funds to meet the acceptances when due. Part of the securities so pledged consisted of the firm's own notes, payable to their own order and endorsed by them in blank, and delivered to the bankers. The firm failed and executed a deed of trust for the benefit of their creditors. The bankers then, in pursuance of the power sold the notes and applied the proceeds in part payment of the firm's indebtedness to them for the acceptances which they had to pay. A

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Trust Estate of Woods, Weeks & Co.

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Court of equity then assumed administration of the trust created by the deed. **HELD:**

- 1st. That these contracts having been made in good faith, are valid, and the bankers can prove under the deed, for the balance of their claim, and the purchasers of the notes having purchased in good faith, can prove for the full amount thereof.
- 2nd. That the subsequent failure and insolvency of the firm, and the execution of the deed of trust, did not prevent the carrying out of these contracts or take from the bankers any rights they held under them.
- 3rd. That as the power to sell at any time was expressly given by the contracts, the right of the purchasers to prove under the deed for their full amount, was not affected by the fact that they purchased the notes after maturity.

Apart from the provisions of the insolvent or bankrupt laws, a debtor has the right, provided he acts in good faith, to prefer one creditor to another.

The right of parties to contract as they please, is restricted only by a few well defined rules, and it must be a very plain case to justify a Court in holding a contract to be against public policy.

**APPEALS** from the Circuit Court of Baltimore City.

The opinion of the Court, together with the dissenting opinion of Chief Judge BARTOL, furnish a statement of the case.

The cause was originally argued before BARTOL, C. J., BOWIE, BRENT and MILLER, J. It was subsequently re-argued on notes, and submitted to BARTOL, C. J., BOWIE, BRENT, GRASON, MILLER and ALVEY, J.

*Randolph Barton* and *Skipwith Wilmer*, for William H. Perot, trustee, and others.

The principal question in this case is one which has never been decided in Maryland. Briefly stated, it is, whether a debtor can give his own notes, not merely as the

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Trust Estate of Woods, Weeks & Co.

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evidence of his indebtedness, but as *collateral security* for it; or whether a simple contract creditor, holding notes of his debtor of the face value of \$100,000, for instance, but upon which he has advanced to his debtor only \$50,000, stands in any better position than if the notes only represented the \$50,000 on their face.

These appellants contend that although a borrower of money may have given his notes for an amount far in excess of the amount really received, yet when he fails in business and makes an assignment for the benefit of his creditors, without preferences, the rights of the general creditors intervene, and the estate can in no way whatever be subjected to the payment of dividends upon a larger basis than that of the *real* debt.

1st. If Messrs. Robert Garrett & Sons had retained the notes and brought suit upon them at law, the measure of their recovery, (inasmuch as the notes were taken as collateral security only,) would have been the amount of the debt intended to be secured. This would have been the amount of the judgment. *Phillips & Maitland vs. Citizens' Bank*, 40 Md., 570.

To a suit on the notes brought by Messrs. Garrett & Sons the obvious defence would have been the want of consideration beyond the real amount loaned.

2nd. In bankruptcy the Messrs. Garrett would have been limited to prove the *real* debt. The fictitious claim, (namely, the face value of the notes,) would not have been tolerated. *Ex parte Farnsworth*, Lowell, 497; *Ex parte Bloxam*, 6 Vesey, 449; *Ex parte Burn*, 2 Rose, 55; *In re Oriental Commercial Bank*, 7 Ch. Appeals, 99, 103; *Ex parte Macredie*, 8 Ch. Appeals, 535.

3rd. In equity the Messrs. Garrett, offering their claim for participation would have been limited to their real claim. As a matter of conscience they could not have sworn to a greater claim than the amount of money loaned. (It will be remembered that they did not *buy* the notes

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Trust Estate of Woods, Weeks & Co.

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outright, they only loaned money, taking the notes as collateral.) *Rigby vs. Macnamara*, 2 Cox, 415; *In re Oriental Commercial Bank*, 7 Ch. Appeal Cases, (*The Law Reports*,) 99.

In this case, on page 103, the Court says:

"But the principle itself—that an insolvent estate, whether wound up in chancery or in bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different persons for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts."

Also, *In re Blakeley Ordnance Co.*, reported in *The Law Reporter*, (*Law Times Reports*,) vol. 21, page 12, also reported in *The Law Reports*, (8 *Equity Cases*, 244.) In this case the facts were identical in principle with the facts in the case at bar. The same claim was made by the creditor as is made here, and was emphatically denied. The insolvent Company had borrowed £4000, giving its acceptances for that amount; and as security had given thirty-two of its debentures for £250 each. The creditor sought to prove both on the acceptances and the debentures; the Court said:

"It is only one debt secured in various modes against themselves, and that distinction is perfectly plain as it appears to me. In every one of the cases which I have last put, you must prove against the Company itself, whether it is on the bill, or on the debenture, or on the covenant, you must prove, and you can only prove for the amount that is due."

The latest case is that of the *Third National Bank vs. The Eastern R. R. Co.*, 122 Mass., 240.

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Trust Estate of Woods, Weeks & Co.

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The Bank was a creditor for \$10,000.00, and held as collateral security, three of the Company's notes for \$10,000.00. It is true an Act of Assembly under which the R. R. Co. was being wound up, was introduced into the case, but upon the claim of the Bank that it was entitled to dividends upon *all* the obligations of its debtor, the Court held that it was limited to its *real claim*, and says, "To enlarge a creditor's claim upon his debtor's estate, because the latter has promised to pay him a larger amount, whether by one or more instruments, is simply to sanction a new mode of secretly encumbering a debt as assets, and of defrauding creditors, either for the benefit of the debtor, or for that of some favored creditor. It is a thing which has never yet been allowed, and which ought not to be allowed, on grounds of public policy."

4th. Such claims are contrary to the spirit of our Registration laws. These laws are all intended to prevent *secret* liens. They are intended to prevent persons from loading their estates with liens which never come to light until they have failed. Yet to allow the claim of Drexel, Morgan & Co. the Garretts and Harvey, will be substantially to give the Messrs. Garrett a prior lien on the estate—a secret one at that—to the full extent of their real claim.

To allow their claim, is equivalent to giving effect to a promise on the part of Woods, Weeks & Co. to the Garretts, that in the event of failure, the latter "may prove for such a sum, no matter how large, as will produce dividends enough to pay back the money borrowed."

Such a proposition, if sustained, must be productive of gross frauds. Debtors on the verge of failure, will secure their friends by the creation of an unlimited number of notes drawn to suit the occasion, and presented against the insolvent estate for participation according to their full value. Equality among creditors will thus be fatally disturbed. False credit will be obtained by merchants, and in insolvent estates, whether being wound up in

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Trust Estate of Woods, Weeks & Co.

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equity under a deed of trust or in insolvency, the anomaly will be presented of persons who are creditors for \$5000.00, proving claims for \$50,000.00, either directly or through the medium of others.

5th. Drexel, Morgan & Co. *confessedly* purchased their notes amounting to \$82,000, *after they had matured*. Harvey purchased his with full knowledge of the objections made to them by the trustee and the creditors. Both then stand merely on such title as the Garretts can pass to them, aided by no application of the doctrine of innocent purchasers.

It is contended then by Drexel, Morgan & Co. the Garretts and Harvey, that the Messrs. Garrett under the contract by which they obtained the notes in question, had the power to pass a perfectly valid title to Drexel, Morgan & Co. and Harvey—and that having thus transferred the notes, the purchasers can prove for their full face against the debtor estate, even if they, the Garretts cannot. But just that proposition was made in the case of the *Blakeley Ordnance Co.*, and the Court says, “then it was very ingeniously suggested, that they, (the creditors,) might sell the debentures; but the person to whom the debentures are sold and transferred, stands in no better position than the person who transfers them in respect of that particular debt. *You cannot by selling or transferring these debentures to ten persons, multiply the proof ten times over, you can only prove once for the debt.*”

The italics are ours, but are made to call attention to what seems to be an adjudication upon a case precisely like the one at bar. Possibly in the *Blakeley Ordnance Case* no specific authority to *sell* the collaterals, was shown to have been given by the borrower, as was the case in the contract between Woods, Weeks & Co. and the Garretts. But the “debentures” were *pledges* in the hands of the lenders, and by implication a right to sell in some form, either by the hands of the lenders or

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Trust Estate of Woods, Weeks & Co.

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by a decree under a foreclosure proceeding, inevitably arose.

So too in the Massachusetts case it was never doubted, but that if the collaterals were valid, as such, the right to sell them existed. So it would seem that the mere right reserved to *sell* the collaterals upon default, gives to the contract no peculiar virtue. The objection to it rests upon the ground that such contracts are, at least as against other creditors, inherently unlawful. When the rights of other creditors intervene, as in insolvency, bankruptcy, assignments for the benefit of creditors, &c., the original lender of money can claim a dividend on no more than his real debt—and that to a person with knowledge of his limited interest in the notes, he can pass no greater right than he has himself.

*William F. Frick*, for Robert Garrett & Sons.

Robert Garrett & Sons, under the contracts and by virtue of their lien as bankers, were *bona fide* holders for value of the notes in question, and as such holders had the right to dispose of them, in accordance with the provisions of the contracts. *Missa vs. Currie*, 1 *Appeal Cases L. R.*, 554, 567, 568, 569; *Bosanquet vs. Dudman*, 1 *Starkie*, 1; *In re Regen's Canal Works*, *Law Reports, Division 1, Chancery*, Vol. 3, 43–48; *Re Barnerd's Banking Co.*, *Kellock's Case*, 18 *Law Times Rep.*, N. S., 672; *Re Agra & Masterman's Bank*, 16 *Law Times Rep.*, N. S., 162; *Re Blakeley Ordnance Co.*, 18 *Law Times Rep.*, 132; *Re The Natal Investment Co.*, 18 *Law Times Rep.*, 171; *Dickson vs. Swansea Railway Co.*, 19 *Law Times Rep.*, N. S., 346; *Roosevelt vs. Marks*, 6 *Johns Ch.*, 266; *Martin vs. Court*, 2 *Term*, 640; *Toussant vs. Martinet*, 2 *Term*, 100; *Heywood vs. Watson*, 4 *Bingham*, 496; *Ex parte Fairlie, Bonham & Co.*, 3 *Deacon & Chitty*, 285.

The contracts of June 2nd, July 5th and July 16th, 1877, by which the securities therein mentioned were sub-

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Trust Estate of Woods, Weeks & Co.

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stituted in place of the merchandise held as collateral, are valid; the parties were capable of contracting; the consideration was adequate; they were not against public policy. Woods, Weeks & Co., upon failure to comply with the terms of the contract, could not question the right of Robert Garrett & Sons to sell any of the securities; and in point of fact, they did not, nor did any member of their firm at any time, either before or after the sale of these notes by Robert Garrett & Sons, make any objection to such sale.

Therefore, neither the trustee (Wm. H. Perot) nor any of the creditors of Woods, Weeks & Co. are in a position to take any exception to the sale of these notes, except such as might lawfully have been made by Woods, Weeks & Co. The distribution of the assets of Woods, Weeks & Co. in this Court must be made upon the principles governing Courts of equity in the administration of insolvent estates; and there is no rule or principle to be found anywhere to the effect that any existing contract with a creditor is to be altered, modified or impaired by the circumstance that the debtor is not able to pay all his creditors in full.

Bankrupt laws may affect rights and remedies under contracts, because all contracts must be treated as having been made subject to them, but in the language of Vice-Chancellor PAGE WOOD, (in *Kellock's Case, Re Barnerd's Banking Co.*, 18 *Law Times Rep.*, 672,) "Where do you find anything that establishes it as a rule or a principle of equity, that when a man is insolvent that a new bargain has to be made with his creditors in consequence of his insolvency, and that his creditors are obliged to realize their securities in a way they were never before compelled to do, or be obliged to part with them without their being realized. This would be to make a new contract; and where do you find any ground for that contract—simply in the circumstance that the estate is not able to pay all its creditors? This case is not to be governed by the rules



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Trust Estate of Woods, Weeks & Co.

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prevailing in bankruptcy, or by rules or analogies of statutes. The whole bankrupt system between creditors and the estate is of a totally different character from that which exists between ordinary debtors and creditors." *Mason vs. Bogg*, 2 Myl. & Craig, 440; *Grimes vs. Saunders*, 3 Otto, 62; *Atlantic Delane Co. vs. James*, 4 Otto, 207, 213, 214; *Jerome vs. McCarter*, 4 Otto, 734, 739.

The Court should have ratified account "G," allowing to Joshua G. Harvey and Drexel, Morgan & Co. dividends upon the amounts of the notes held by them respectively; and to Robert Garrett & Sons a dividend upon the amount of their claim, as reduced by credits of the amounts received from the sales to those parties of their collaterals, inasmuch as none of the other accounts stated by the auditor are based upon any principle of distribution which respects the rights of Robert Garrett & Sons and the parties to whom they made sales of their collaterals, under the provisions of the contracts with Woods, Weeks & Co.

*E. J. D. Cross* and *John K. Cowen*, for Drexel, Morgan & Co.

It is conceded that these appellants purchased, on the 15th day of November, 1877, of Robert Garrett & Sons, the notes of Woods, Weeks & Co., which were drawn to the order of said Woods, Weeks & Co., and by them endorsed. Said notes amounted to \$82,000, for which they paid Robert Garrett & Sons \$24,600, or thirty per cent. of their face value. The said notes were overdue when purchased. The appellants claim that they are entitled to a dividend on said notes from the estate of Woods, Weeks & Co., now in course of distribution under the provisions of the deed of trust; and that account "G," wherein they are allowed \$23,961, should be ratified, and the other accounts disallowed.

The notes purchased by these appellants being overdue on the 15th November, 1877, when they were purchased

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Trust Estate of Woods, Weeks & Co.

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from Robert Garrett & Sons, were bought at a fair market value, having reference to the amount of the dividend then understood as likely to be realized from the assets of Woods, Weeks & Co. As overdue notes, they were taken *subject only to the equities which arose out of the transaction to which they owed their origin, and which existed at the time of the transfer*. These equities, therefore, must be ascertained and determined by the terms of the contract under which they were issued by Woods, Weeks & Co. If under the provisions of that contract, the contingency had arisen under which Robert Garrett & Sons were authorized to make sale of these notes, there was no equity existing between the makers and holders to prevent a sale of them, which would bind Woods, Weeks & Co. to the payment of the full face thereof to the purchaser.

That contingency had arisen, and if Woods, Weeks & Co. were sued by these appellants upon those notes, they would have no valid defence to the action, and in point of fact, they appear upon the record as not making any objection or defence to the rights of these appellants as holders of the notes. If it will not lie in their mouth to say that they have any equity to resist payment of these notes, there is no ground upon which their trustee or other creditors can impeach the appellants' title to them.

The exceptions on the part of the trustee of Woods, Weeks & Co. are, that the notes purchased by these appellants of Robert Garrett & Sons were "illegal in their creation, and without consideration;" further, that they were taken by these claimants "with full knowledge that their legality was disputed, and that the consideration for them was denied" by the trustee and certain creditors. It appears, however, to be conclusively shown by the proof and admissions in the case, that at the time the notes were issued, Robert Garrett & Sons gave full value for them.

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Trust Estate of Woods, Weeks & Co.

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The fact that the sale to these appellants was made after the maturity of the paper, is relied upon by counsel for the trustee of Woods, Weeks & Co. as conclusive against our right to prove upon them to their face value. This is not so. "A promissory note is certainly negotiable as well after as before it becomes due," said this Court in *Annan vs. Houck*, 4 Gill, 331. *The makers of the paper held by us, intended and stipulated that these notes should be negotiable as well after as before maturity*, for they agreed with Robert Garrett & Sons to that effect. What other construction can be placed upon the provision in all the contracts under which the notes were taken, and merchandise equal or greater in value surrendered, where they say: "The said Robert Garrett & Sons may, at any time thereafter, proceed to sell said securities at either public or private sale, or otherwise, without notice of the time or place of sale, for the purpose of satisfying said credits." A power of disposition so extensive in regard to commercial paper, cannot be said to limit its negotiability to the period prior to its maturity, especially when the time within which this power could have been exercised before the maturity of each lot of paper given under the three contracts is considered.

The equities to which overdue paper are subject are limited to those arising out of the transaction which is the origin of the paper, and which existed at the time of the transfer. This is the rule. It is well stated by Justice CRESWELL, in the case of *Sturtevant vs. Ford*, 4 Man. & Gr., 106.

What then are the *equities* attaching to these notes which prevent these appellants from proving them against the estate of the makers thereof, now in distribution under the deed of trust? None such exist. The positive provision in the contracts, that they might be sold at any time, for the purpose of providing funds to meet the letters of credit, is conclusive upon the question of the right of Robert Garrett & Sons to sell them after maturity.

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Trust Estate of Woods, Weeks & Co.

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It is a well settled rule of the law of notes and bills that accommodation notes or bills are negotiable as well after as before maturity. *Renwick vs. Williams*, 2 *Md.*, 356; *Charles vs. Marsden*, 1 *Taunt.*, 224, 225; *Sturtevant vs. Ford*, 4 *M. & G.*, 101, (43 *E. C. L.*;) *Davis vs. Miller*, 14 *Grattan*, 1; *Atwood vs. Crowdie*, 1 *Starkie Rep.*, 483; 1 *Daniel on Negotiable Instruments*, secs. 726, 786; *Smith vs. Knox*, 3 *Esp.*, 46.

The present case is stronger than that of overdue accommodation paper, in that the makers expressly stipulated in writing that the paper could be sold at any time. These notes "fulfilled the design of their makers, and accomplished the purpose for which they were issued." They have been applied to the precise purpose for which they were designed when originally made; that is to say, they have been sold to meet the default of the makers, in not covering the drafts, to secure which they were pledged.

There can be no question that if the appellants had purchased the paper before maturity they could recover upon it. When the paper was "sent into the world," to use Lord ELDON's expression, in *Smith vs. Knox*, 3 *Esp.*, 46, for the purpose of being "sold at any time thereafter," "the equity of the maker" certainly cannot be that the paper was sold after maturity.

By the contracts of substitution, the holders, Robert Garrett & Sons, were empowered by the makers to give an endorsee for value an absolute title to recover upon the notes. It is not questioned that Drexel, Morgan & Co. paid Robert Garrett & Sons, on the 15th day of November, 1877, \$24,600 for the notes they now hold; their good faith has not been impeached. They are, therefore, holders for value, and entitled to prove against the estate of Woods, Weeks & Co. the notes which they have purchased.

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Trust Estate of Woods, Weeks & Co.

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*E. J. D. Cross* and *John K. Cowen*, for Joshua G. Harvey.

On the 12th day of November, 1877, the appellant purchased from Robert Garrett & Sons four notes, of \$6000 each, of which Woods, Weeks & Co., were the makers and endorsers. These notes being made by Woods, Weeks & Co. to their own order, and being by them endorsed, were transferable by delivery. They were not due at the time they were purchased by the appellant. They were offered to him by Mr. T. Harrison Garrett, at thirty-two and a half cents on the dollar, and having been informed by Messrs. Daniel and Alexander Woods, of whom he made inquiry, that the estate of Woods, Weeks & Co. would probably pay from forty to fifty per cent., certainly forty per cent., he purchased them at the price offered, and on the 12th of November, 1877, gave his check on the Western National Bank for \$7800, the amount of the purchase money.

Under the well settled principles of commercial law the appellant must be considered as a *bona fide* holder, for a valuable consideration, of said notes, having acquired them in the ordinary course of business before maturity.

Woods, Weeks & Co. had made an assignment of their property to pay their debts. The dividend estimated by competent persons was forty per cent. The price paid was thirty-two and a half per cent. There could be nothing in the price paid which would affect the transaction.

The appellant being a *bona fide* holder for value, without notice, is entitled to prove the four notes filed with his claim against the estate of Woods, Weeks & Co., to their full face value, unaffected by anything in the contracts under which the notes were given, and entirely free from any defects or infirmities in the title of the person from whom he purchased them, if there was any defect in that title. *Davis vs. West Saratoga Building Union, No.*

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Trust Estate of Woods, Weeks & Co.

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3, 32 *Md.*, 285 ; *Gwyn vs. Lee*, 9 *Gill*, 137 ; *Daniel on Nego. Instruments*, ch. XXIV ; 1 *Daniel on Nego. Instruments*, secs. 771, 776 ; 2 *Daniel on Nego. Instruments*, sec. 1503.

*William F. Frick*, for the Western National Bank of Baltimore.

MILLER, J., delivered the opinion of the Court.

When Robert Garrett & Sons, bankers, issued the three letters of credit in favor of Woods, Weeks & Co., which enabled the latter to purchase and import the cargoes of sugar by the "Addie Hale," the "Mary C. Mariner" and the "Alice Bradshaw," the importing firm, by an agreement appended to each letter, agreed to furnish the Garretts with funds to meet the acceptances they might make under it, and as security therefor gave them a specific lien on the cargo to an amount sufficient to cover their advances, with full power to take possession and dispose of the same at their discretion, and agreed to endorse to them the bill of lading if so desired, and further pledged to them as security for any other indebtedness of the firm to them, any surplus that might remain either in the goods or proceeds thereof, after providing for the acceptances under that credit. When the cargoes severally arrived in Baltimore the acceptances of the Garretts had not matured, and they received the bills of lading and took possession of the cargoes as security for the indebtedness of the firm, according to the terms of the letters of credit and the contracts thereto attached.

But the firm being desirous of obtaining immediate possession of these cargoes for the purpose of their business as sugar refiners, after the arrival of each vessel, entered into a separate contract with the Garretts by which this object was accomplished. By these contracts the Garretts parted with their possession of, and lien on the cargoes, and received in lieu thereof certain collateral secu-

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Trust Estate of Woods, Weeks & Co.

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rities in each case. The terms of these several agreements are identical, and I shall take the case of the importation by the "Addie Hale" as an illustration. The letter of credit under which this importation was effected was for \$50,000, and the Garretts had accepted drafts thereunder to the amount of \$40,000. When the cargo arrived the Garretts held the bill of lading and took possession of the sugar, and afterwards delivered it to the firm upon the latter giving them a *receipt* for the merchandise specified in the bill of lading "against *notes* deposited with them as collateral security, amounting to the sum of \$60,140.78, as per memorandum on the other side." This receipt which embodies the contract and engagement on the part of the firm, then stipulates that if the drafts accepted by the Garretts be not covered by the firm at the time specified in the letter of credit, then the Garretts "*may at any time thereafter proceed to sell said securities*, at either public or private sale, *without notice of time or place of sale* for the purpose of satisfying said credit, and upon such sale said Garretts may purchase the whole or any part of such securities so sold, discharged from any right of redemption, and it is understood and agreed that any and all other securities belonging to the firm now in the hands of the Garretts shall be liable for any deficiency on account of this contract, and any surplus from this contract after settlement thereof shall be applied to any indebtedness that may be due or become due to said Robert Garrett & Sons." Of the securities, amounting in all to \$60,140.78, referred to in this contract and noted thereon, \$20,140.78 consisted of notes and bills, due and payable to the firm by their customers, and endorsed by the firm to the Garretts, and \$40,000 consisted of the *firm's own notes, payable to their own order and endorsed by the firm in blank and by them delivered to the Garretts*. Some time after these contracts were made and the securities delivered thereunder, the firm failed and executed a deed of

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Trust Estate of Woods, Weeks & Co.

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trust conveying all their property to Perot as trustee for the benefit of their creditors. The firm, therefore, failed to meet their obligations to the Garretts, and the latter in pursuance of the power of sale under these contracts, sold *the notes of the firm* thus pledged as collateral security for their debt. Of these notes those sold to Drexel, Morgan & Co. were sold after their maturity, and those sold to Harvey were sold before they matured. The proceeds of these sales, as well as the amount collected from the other collaterals, were applied by the Garretts in part payment of the debt due to them, and a balance still remains due thereon. A Court of equity has taken charge of the administration of the trust created by the deed, the assets of the firm have been sold by the trustee, and the proceeds have been brought into Court for distribution. Under notice to creditors the Garretts have filed a claim for the balance thus due to them, and the purchasers of these notes have also presented them as claims against the fund, and the main question in the case is, have these purchasers a right to a dividend for the full amount of these notes?

It seems to me that this and all other controverted questions arising on these appeals depend altogether upon the validity or invalidity of these contracts. In other words, was it competent and lawful for the firm to draw their own notes, payable to their own order, endorse them in blank and deliver them to the Garretts as collateral security, with power to the pledgees in case of default by the pledgors, to *sell them* in the market for what they will bring, and apply the proceeds in discharge of the debts they were pledged to secure? There is nothing to show that these contracts were not made in good faith, nor is it pretended the Garretts did any anything under them which the contracts themselves did not expressly authorize. The power of sale is expressed in the broadest terms. It may be made without notice of time or place, and *at any time* after default whether the notes had then matured or not. The fairness



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Trust Estate of Woods, Weeks & Co.

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and good faith of the sale stand unimpeached. Nor if the contracts be valid can it be pretended that the Garretts are responsible for the consequences resulting from the sale. It was their undoubted right to secure, if possible, by all lawful means full payment of this debt which was most justly due them. The contingency of a sale is expressly provided for, and its effects must have been within the contemplation of the parties when the contracts were made. Are they then valid and lawful contracts? In answer to this question I must say I am unable to perceive upon what ground they can be successfully assailed. Certainly not for want of consideration, for the Garretts upon the faith of them gave up the property they held which was ample security for the debt, and the firm acquired immediate possession of it for their business purposes. If it be said they constitute a preference, and are therefore void as against creditors, the answer is that apart from the provisions of the insolvent or bankrupt laws, a debtor has the unquestioned right, provided he acts in good faith, to prefer one creditor to another. No question under the insolvent or bankrupt laws arises in this case, and the failure of the firm and the execution of the deed of trust, in nowise prevented the carrying out of the contracts or took from the Garretts any rights which they held under them. On what principle can it be said that a contract like this between debtor and creditor, made intelligently and in good faith, can be altered in a way prejudicial to the creditor, or its execution prevented by the subsequent insolvency of the debtor? It has been argued that such contracts are against *public policy* and therefore void. But the right of parties to contract as they please is restricted only by a few well defined and well settled rules, and it must be a very plain case to justify a Court in holding a contract to be against public policy. It must be a case in which the common sense of the entire community would so pronounce it. But to apply this doc-

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Trust Estate of Woods, Weeks & Co.

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trine to a commercial contract of this description entered into in good faith between merchants, would, in my judgment, be as unwarranted as it is unprecedented.

But it is said the giving of these notes was a mere increase or duplication of the debt due by the firm to the Garretts, and they cannot be used or considered as collateral security therefor, that the amount of that debt diminished by the proceeds of the other collaterals, is all that is entitled to a dividend under this deed, and that such dividend must be distributed *pro rata* between the Garretts and the purchasers of the notes. It is true the effect of carrying out these contracts by a sale of the notes was to increase the *general indebtedness* of the firm, but it did not increase the debt then due the Garretts for which the notes were pledged as security. But this increase of general indebtedness is exactly what the contracts contemplated, and what the parties intended in case a sale was made, so that the question comes back at last to the validity of the contracts in this respect. Now, if instead of giving these notes, in the form in which they were drawn, to the Garretts as collateral security, the firm had placed them in the hands of a broker, for sale, and he had sold them to the same parties, and for the same price the Garretts obtained for them, and the firm had received the proceeds and applied them to this debt, exactly the same result would have followed. There would have been the same increase of the general indebtedness of the firm and the same dimunition of the Garrett debt, which was effected by the sale under the contracts, and in the case supposed it will hardly be contended that the purchasers would not have had a valid claim against the firm for the full amount of the notes. Such notes are constantly sold on the streets in all the large commercial cities of the country, and it is not uncommon for merchants to resort to this mode of raising money. However hazardous it may be, there is nothing unlawful in it,

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Trust Estate of Woods, Weeks & Co.

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and it cannot be doubted but that the purchasers acquire a good title to such paper. It is apparent to my mind, that it was in view of this recognized practice, and the acknowledged rights of purchasers in such cases, that these contracts were made and the notes sold thereunder. With this *right of sale*, the notes became, in the hands of the Garretts, a valuable and reliable security for the debts due to them under the letters of credit, and I am unable to discover any ground on which the firm or their other creditors can impeach the transactions. The authorities cited in support of opposite conclusions, while differing in other respects, appear to me to be clearly distinguishable from the present case in that there is here *an express power of sale*, which the parties intended if carried into effect, should result in the consequences which have followed, and which has been *actually executed*. Expressions dropping *obiter* from Judges in one or two cases only, even if they tend to support such conclusions, are wholly insufficient to establish them, and I have seen no case in which it has been necessary to decide, or in which it has been decided that such contracts are either unlawful or ineffectual. On the contrary, there are decisions entitled to the highest respect, which in my judgment, go very far to sustain them. I refer to the cases of *The Morris Canal & Bank Company vs. Fisher*, 1 *Stockton's Ch. Rep.*, 671, and *In re Regents Iron Works Company*, (*Law Rep.*,) 3 *Ch. Div.*, 43, which was decided in 1876.

In the first of these cases, the facts are briefly these: The Canal Company borrowed \$1500 from Mr. Lewis, and gave him their note for that amount, at eight months, and at the same time deposited with him as collateral security, their own bonds to the amount of \$3000. The note was not paid at maturity, and Lewis, after notice to the Company, advertised and sold the bonds at public auction. The bonds did not sell for enough to pay the note, and Lewis recovered a judgment against the Company for the

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Trust Estate of Woods, Weeks & Co.

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balance. Fisher, the purchaser of the bonds, then insisted upon his right to be recognized as their creditor for the full amount of the bonds, and this claim was resisted by the Company. But upon a bill filed to enforce it, the chancery Court decided, (and that decision was affirmed by the unanimous judgment of the Court of Appeals,) that the claim was well founded, and that the purchaser was entitled to the extent of the bonds held by him, equally with all the other bondholders, to the benefit of the mortgage given by the Company on all their property as security for the bonds they had authorized to be issued. In the latter case it appears that the Iron Works Company resolved to issue one hundred debentures of £250 each. Sixty of these were taken up by different persons, and then the International Financial Society agreed to advance to the Iron Works Company £8000, by discounting their notes to that amount, bearing ten per cent. interest, and as collateral security for the money so advanced, the Company gave to the Society the other forty debentures amounting to £10,000. It was also agreed that if the notes were not paid, the Society should be at liberty to sell the debentures, and apply the proceeds of sale towards the payment of what remained due to them, but this power of sale was *never exercised*, and the Society *held on* to the debentures. The Company was afterwards ordered to be wound up, and there was in Court a considerable sum, the proceeds of their property. The Society to whom about £5600 was due for principal and interest, claimed to prove for the £10,000, and to share with the other debenture holders. Now in this state of facts, how was the case dealt with by the Court? The *Vice-Chancellor*, (MALINS,) was of opinion and ordered that the Society was entitled to prove for the amount of the forty debentures transferred to them, *pari passu* with the holders of the other sixty, but is not to receive more in the whole than what is due them for principal, interest and costs, in respect

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Trust Estate of Woods, Weeks & Co.

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of the £8000 advanced by them with ten per cent. interest. On appeal, it was argued that these debentures might perhaps have been issued at a discount, but could not be issued as collateral security; that the property of the Company might be made collateral security, but not these debentures. But the order was sustained and the appeal dismissed. JAMES, L. J., in delivering his judgment says: "the Company has dealt with these forty debentures, by making them a collateral security for the sum of £8000, and interest at ten per cent. That was the bargain between the Financial Society and the Company. The Company could not recede from that bargain, and I cannot see that there is any equity on the part of the holders of the other sixty to alter the bargain between the debtors and the creditors." MELLISH, L. J., says: "as between the Company and the Society, there is no doubt that the debentures were to be a collateral security for the money which was lent upon the promissory note and interest. That was the bargain between them, and one of the terms of the bargain was that the Financial Society was to be entitled to sell the debentures. \* \* Then the real question is, have the other debenture holders any equity to prevent that bargain from being carried out? \* \* I do not see any reason why they should complain that the directors issued them as a collateral security, for the payment of the notes and interest. They are not injured as the debentures cannot be paid twice over—they can only be paid once. The order treats them as a collateral security, and says that they are to be availed of until the holders are paid the whole amount for which they were intended to be a collateral security. That order appears to me to be quite correct." And BAGGALLAY, A. J., says: "I am of the same opinion. It appears to me that the directors had power to do that which they did, namely, to issue the debentures for £10,000, as a collateral security for the loan of £8000, which was primarily secured by the promissory notes."

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Trust Estate of Woods, Weeks & Co.

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These cases have been cited, not as conclusive of this, because the facts are not identical, and it is possible there may be some distinction between them, but in support of the position that other obligations of the same party may be issued and used, and treated as collateral security coupled with a power of sale for a debt which he owes. Now if it be once conceded that it is competent and lawful for a merchant to make a note payable to his own order, endorse it in blank, and sell it on the street through a broker in order to raise money to carry on his business, why may he not, for like business purposes, give such a note as collateral security for an existing debt, with power to his creditor to sell it in the market in case he makes default in paying that debt? Other creditors are no more injuriously affected, and he no more "encumbers his assets to the prejudice of his other creditors" by the one transaction than by the other, and I cannot see what equity they have to prevent such a contract from being carried out, or what legal right of theirs it invades, if it be made and executed in good faith.

Holding then that these contracts are valid and effective, I do not think the question whether the notes were sold before or after maturity at all material. The power to sell after maturity is expressly given by the contracts, and when so sold the notes fulfilled the design of their makers, and accomplished the purpose for which they were issued as effectually as if they had been sold before maturity. In the face of these contracts the makers have no equity to set up against the notes, and the purchasers could safely take them, though overdue. In the case of *Renwick vs. Williams*, 2 Md., 356, Mrs. Chase loaned her grandson, Barney, her promissory note for \$2000. He gave her nothing for it. After its maturity he transferred it to Renwick in settlement of two bills of furniture, amounting to \$755.50, and the Court held that Renwick was entitled to recover the whole amount of the note against the

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Trust Estate of Woods, Weeks & Co.

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executors of the maker. Other authorities almost without number could be cited to the same effect. The present case, however, is much stronger than that of overdue accommodation paper, because the makers have here expressly stipulated in writing that the notes might be sold at any time, as well after as before maturity.

Inasmuch as all the dealings between the Garretts and this firm were founded on contracts identical with the one thus noticed and considered, and all the notes held under these several contracts were disposed of to the same parties, it follows, in my judgment, that account G is stated upon correct principles, and the order appealed from which ratifies account L should be reversed upon the appeals taken by the Garretts, by Drexel, Morgan & Co., and by Harvey.

As respects the appeal taken by the Western Bank, all that need be said is that this Court has been informed by the Bank's counsel, since the appeal was taken, that its claim has been settled and paid in full, and hence no question presented by that appeal is before the Court, even if any different question from those already considered in this opinion would have arisen if the claim had not been paid and settled.

I am instructed by a majority of the Judges who have participated in the consideration and decision of this case, to say that they concur in the views expressed in this opinion, and the result therefore is, that the order appealed from must be reversed and the cause remanded, to the end that an account may be stated distributing the fund accordingly.

The costs of these appeals is directed to be paid out of the fund.

*Order reversed, and  
cause remanded.*

(Decided 17th July, 1879.)

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Trust Estate of Woods, Weeks & Co.

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BARTOL, C. J., filed the following dissenting opinion :

The questions on these appeals arise upon the distribution of the property and effects of Woods, Weeks & Co. among their creditors, under their deed of trust made to William H. Perot, dated July 24th 1877.

On the petition of Perot, the trustee, the Circuit Court took jurisdiction of the trust estate, notice was given to the creditors who filed their claims, and the cause being referred to the auditor, he stated and reported several accounts, marked "F," "G," "H," "K," and "L."

By the order of the Circuit Court passed *pro forma*, "*Account L*" was ratified, and from that order these appeals were taken.

The claims of the appellants *Garrett & Sons, Drexel, Morgan & Co.* and *Joshua G. Harvey*, all had their origin in the dealings between the Garretts and Woods, Weeks & Co; these began, as it appears by the record, as early as 1875.

Woods, Weeks & Co. were merchants engaged in the business of importing and refining sugar, and had an account current with Robert Garrett & Sons, Bankers.

By an agreement between the two houses, Woods, Weeks & Co. had the privilege of overdrawing this account, by depositing with Robert Garrett & Sons, securities for advances made to them on their over-drafts. In compliance with this agreement Woods, Weeks & Co. deposited in February 1876, certain certificates of stocks, and bills receivable belonging to the firm or to the individual members, and also their own promissory notes; as these notes matured, they were either renewed or others substituted for them, and this was continued until the failure of Woods, Weeks & Co., July 23rd 1877.

The indebtedness of Woods, Weeks & Co. on their overdrawn bank account, was settled soon after their failure, by the collection of the collaterals which had been pledged as security. But there remained in the hands of Robert



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Trust Estate of Woods, Weeks & Co.

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Garrett & Sons four promissory notes of Woods, Weeks & Co. for \$6000 each, deposited under the agreement before mentioned.

These, Robert Garrett & Sons claimed the right to hold, and to sell under the agreement, and on the 12th day of November 1877, sold the same to *Joshua G. Harvey* for \$7740, and these constitute Harvey's claim, filed with the auditor.

By the agreement before referred to dated February 2nd 1876, it was stipulated, that the stocks, bills receivable, and promissory notes of Woods, Weeks & Co. were pledged as collateral security for "the payment of moneys advanced to Woods, Weeks & Co. in account, and for any indebtedness at present existing, or which may hereafter exist, with the understanding that if either of said loans, etc., or any one or more renewals thereof which may be made by Robert Garrett & Sons shall not be paid at maturity, the said Robert Garrett & Sons may, at any time thereafter, proceed to sell said stock and notes, at either public or private sale, or otherwise, without notice of time or place of sale for the purpose of satisfying said loans, etc. or renewals," with the privilege to Robert Garrett & Sons to purchase the same, discharged from any right of redemption.

And it was thereby further "understood and agreed, that any and all other securities belonging to Woods, Weeks & Co. now in the hands of Robert Garrett & Sons, shall be liable for any deficiency on account of this contract; and *any surplus from this contract, after settlement thereof, shall be applied to any indebtedness that may be due or become due to Robert Garrett & Sons.*"

In addition to the Bank account other transactions took place between the parties in the year 1877.

To enable them to make their several importations, Woods, Weeks & Co. obtained from Robert Garrett & Sons letters of credit, and to secure to the latter the pay-

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Trust Estate of Woods, Weeks & Co.

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ment of their acceptances, together with one per cent. commissions, Woods, Weeks & Co. entered into agreements, whereby the cargoes purchased with the credits so issued, were to be consigned to Robert Garrett & Sons, the bills of lading drawn to their order, and they were to have a specific lien upon the cargoes.

Four importations were made, viz., one by the "*Brig Addie Hale*," (No. 8 in the record,) upon which Robert Garrett & Sons issued a letter of credit for \$50,000, on which Woods, Weeks & Co. valued to the amount of \$40,000. One by the "*Brig Mary C. Mariner*," (No. 9 in the record,) upon which the letter of credit was for \$50,000, on which Woods, Weeks & Co. valued to the amount of \$28,000. One by the "*Brig Alice Bradshaw*," (No. 10 in the record,) on which the letter of credit was for \$40,000, and the amount valued thereon by Woods, Weeks & Co. was \$33,141.45, and one by the "*Houston*," (No. 28 in the record,) on which the letter of credit was for £10,000 sterling, and the acceptances thereon of Robert Garrett & Sons amounted in United States currency to \$14,090.76.

This last cargo arrived after the failure of Woods, Weeks & Co., and was sold by Robert Garrett & Sons, consignees, the receipts therefrom more than reimbursed their acceptances on that account, and the surplus was applied to the credit of Woods, Weeks & Co.

With respect to the other importations, "Nos. 8, 9, 10," the course of dealing between the parties was as follows:

As the cargoes arrived before the acceptances of Robert Garrett & Sons matured, and Woods, Weeks & Co. desired to have possession of the same for their business operations, the merchandise was by agreement delivered to them, and in lieu thereof, and to secure to Robert Garrett & Sons the payment of their acceptances, Woods, Weeks & Co. deposited with Robert Garrett & Sons their own

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 Trust Estate of Woods, Weeks & Co.
 

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promissory notes and certain collaterals, that is to say, in lieu of the cargo of the "*Addie Hale*" they deposited

Their own promissory notes, amount- ing to.....	\$40,000.00
And collaterals amounting to.....	20,240.00
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	\$60,240.00
In lieu of the cargo of the " <i>Mary C.</i> <i>Mariner</i> " they deposited their own promissory notes for.....	\$28,000.00
And collaterals for.....	14,001.19
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	\$42,001.19
In lieu of the cargo of the " <i>Alice</i> <i>Bradshaw</i> " they deposited their own promissory notes.....	\$14,000.00
And collaterals for.....	7,248.00
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	\$21,248.00

The several agreements under which the promissory notes and collaterals were deposited, and the merchandise delivered to the possession of Woods, Weeks & Co., each contained the same stipulations as those contained in the agreement of February 2nd, 1876, before recited, authorizing Robert Garrett & Sons to sell the promissory notes and collaterals in case of default, &c.

The promissory notes deposited under these agreements, fourteen in number, amounting to \$82,000.00, remained in the hands of Robert Garrett & Sons at the time of the failure of Woods, Weeks & Co., and were by them sold to *Drexel, Morgan & Co.*, for \$24,395. These notes constitute the claim of *Drexel, Morgan & Co.*, filed with the auditor. When sold the notes were overdue.

It appears by the account of Robert Garrett & Sons, that Woods, Weeks & Co., owed them, at the time the

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Trust Estate of Woods, Weeks & Co.

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deed of trust was executed, July 24th 1877, a balance of \$134,719.79.

For which they held

The promissory notes of Woods, Weeks & Co., \$106,000.

Notes of other parties as collaterals, about \$62,000.00, and the cargo of the Houston to arrive.

By receipts from collection of collaterals and sale of cargo of the Houston, the balance due Robert Garrett & Sons was reduced to \$50,537.77.

This was the state of the account when the promissory notes were sold to Drexel, Morgan & Co., and Harvey.

Deducting the amounts realized from those sales, there remained a balance due Robert Garrett & Sons, including interest, of \$19,313.90, and this constitutes the claim of Robert Garrett & Sons, filed with the auditor.

Thus while the real amount or balance due Robert Garrett & Sons was \$50,537.77, there are exhibited accounts against the trust estate, claiming to share in the distribution, amounting to \$126,250.40, which is the aggregate of the claims of Drexel, Morgan & Co., Harvey, and Robert Garrett & Sons, all growing out of the transactions between the latter and Woods, Weeks & Co.

Ought these claims to be allowed? As they arise out of, and depend upon, the rights of Robert Garrett & Sons, it becomes necessary in the first instance, to consider the nature and extent of their rights. If they had retained the promissory notes, and brought suit thereon they could recover no more than the amount of the debt actually due, which the promissory notes were given to secure. *Maitland vs. Citizens' Bank*, 40 Md., 540, 570. As said in that case, while the Garretts were holders for value, they were only so to the extent necessary to protect the debts intended to be secured.

In that case the note of a third person was held as collateral; the same rule applies *a fortiori*, where the notes given in security, are those of the debtor himself. In a

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Trust Estate of Woods, Weeks & Co.

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suit upon such notes it is very clear no more than the real debt could be recovered. The same rule would apply if the Garretts were here exhibiting the promissory notes, and claiming a dividend thereon against the trust estate; they would be allowed to prove for no more than the amount of the debt actually due. In bankruptcy this rule has been settled by numerous decisions both in England and in this country. The appellants contend that a different rule governs in Courts of equity, and have referred to several cases, all of which have been examined.

Among them the cases most relied on are *Re Barnerd's Banking Company, Kellock & Co.'s Claim*, and *Re the Xeres Wine Shipping Company, The Alliance Bank's Claim*, decided on appeal before the Lords Justices in 1868, and reported in 18 *L. Times R., N. S.*, 671.

Those cases were in equity, under what is known in England as "*the winding up Acts.*" The *Xeres Wine Company* was in the course of liquidation. The Alliance Bank was its creditor to the amount of £15,638 1s., and held certain Dock Wine warrants as security for the debt, with the right to sell the wine referred to in them to the amount of £12,000. The winding up order was made in December, 1864. In November, 1865, and later, the Bank sold wine sufficient to realize £12,000, and applied the proceeds in part payment of the debt. The Bank claimed to prove for the full amount of principal and interest due them, notwithstanding the receipts from the sale of the wine; provided they should not be paid more than twenty shillings in the pound.

MALINS, V. C., decided that the Rule in Bankruptcy was applicable, and that the Bank was entitled to prove for no more than the balance due, after deducting the amount of proceeds of the sales. 18 *Law Times Rep., N. S.*, 177. This decision was reversed on appeal, the Lords Justices deciding that the Alliance Bank was entitled to prove for the whole debt.

In the appeal of "*Barnerd's Banking Co.*," which had been decided by the Master of the Rolls, in favor of the Bank, (Kellock claimants,) the decision was affirmed on appeal.

In these cases it was held,

*First*, That the time for computing the amount of the debt was the time when it was sent in under the general order; and,

*Secondly*, That the creditor was entitled to prove for the whole amount of the debt then due, without reference to the value of the security or pledge then held, and which had not then been realized. The Rule in *Mason vs. Bogg*, 2 Myl. & Cr., 443, was followed, and not that in *Greenwood vs. Taylor*, 2 R. & Myl., 185.

The same principle was also decided, in the same year in *Midland Banking Co. vs. Chambers*, Law Rep., 5 Equity Cases, 179. There the collateral security was a guarantee of a third person.

And also in *Ex parte Manchester and Liverpool D. Banking Co.*, Law Rep., 18 Eq. Cases, 249, decided on appeal in 1874.

In these cases the security held by the creditor was either property pledged, or the guarantee of third persons.

A case more analagous to the present was decided in 1869 by Lord ROMILLY, reported in 21 L. Times R., N. S., 12, in *Re Blakely Ordnance Co.*, *Ex parte the Metropolitan Bank*, which was a case in equity under the "Winding up Acts." There the Bank was creditor of the Blakely Ordnance Co., on its acceptances for £4000, and held as security 32 debentures of the company for £250 each, upon which the Bank sought to prove, but it was held that they were not entitled to prove for more than the £4000, the amount actually due. *Kellock's Case* was cited and considered, and his Lordship drew the distinction between that and the case before him. He says "*Kellock's Case* does not apply. I will give two or three instances to show what my mean-

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 Trust Estate of Woods, Weeks & Co.
 

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ing is. For instance, the Company owes the Bank £4000, for which they give a bill, and they execute a mortgage on White-acre. There *Kellock's Case* applies. Again, if the company owe £4000, and pledge 100 bales of cotton, then *Kellock's Case* applies; the Bank may sell the cotton for what it is worth and prove the whole debt. I will go a step further. I will assume that they have got thirty-two debentures in Company X, and that they pledge those. Then *Kellock's Case* applies again. The Bank may realize those debentures against Company X and prove for the whole of their debt. But the present case is quite different. Suppose that, in addition to the promissory notes for £4000, they give two other promissory notes for a similar amount, then *Kellock's Case* does not apply at all. \* \* \* \* \* It is only one debt, secured in various modes against themselves, and that distinction is perfectly plain, as it appears to me. In every one of the cases which I have last put, you must prove against the company itself, \* \* \* \* \* and you can only prove for the amount that is due." \* \* \* \* \* He then adds, "It was very ingeniously suggested by Mr. Higgins in his argument, that they might sell the debentures; but the person to whom the debentures are sold and transferred, stands in no better position than the person who transfers them, in respect of that particular debt. You cannot by selling or transferring these debentures to ten persons, multiply the proof ten times over. You can only prove once for the debt."

This decision seems to me to be reasonable and just. It is in harmony with *Rigby vs. Macnamara*, 2 Cox, 415, and *In re Oriental Bank, Ex parte European Bank*, Law Rep., 7 Ch. App., 99; in this case it was said by MELLISH, L. J.: "The principle itself, that an insolvent estate, whether wound up in chancery or in bankruptcy ought not to pay two dividends in respect of the same debt, appears to me to be a perfectly sound principle. If it were not so, a creditor

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Trust Estate of Woods, Weeks & Co.

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could always manage, by getting his debtor to enter into several distinct contracts, with different people for the same debt, to obtain higher dividends than the other creditors, or perhaps get his debt paid in full. I apprehend that is what the law does not allow ; the true principle is, that there is only to be one dividend, in respect to what is in substance the same debt, although there may be two separate contracts."

And in *Third National Bank vs. Eastern R. R. Co.*, 122 *Mass.*, 240, which arose under an Act of the Legislature, providing for the payment of *creditors equally* out of the property and earnings of the Railroad Co., the same principle was decided. The Court say, "a debtor's liability to his creditors, where other creditors are concerned, is not increased by increasing the number of promises to pay the same debt, in whatever form he may make them."

The cases of *Regents' Canal Iron Works Company, L. R. 3 Ch. Div.*, 43, and *Morris' Canal & B. Co. vs. Fisher*, 1 *Stockton*, 667, cited by the appellants, in the re-argument do not seem to me to be in conflict with the rule before stated. The case in *Stockton* was referred to and considered by the Court in 122 *Mass.*, before cited.

Such being the rights of Robert Garrett & Sons as against the trust funds, I think "Account L" is correct so far as it allows a dividend only on the debt actually due from Woods, Weeks & Co., and which was secured by their promissory notes held by Robert Garrett & Sons. These notes were sold to Drexel, Morgan & Co. and Joshua G. Harvey ; the question next to be considered is, what rights did the parties acquire by the purchase ?

As to Drexel, Morgan & Co. These parties purchased the notes now held by them, after they were past due and dishonored ; they took them therefore subject to the equities inherent in them and then existing between the original parties, and acquired no better right against the trust fund than the Garretts could have asserted at the time of



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Trust Estate of Woods, Weeks & Co.

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the transfer. As the notes acquired by them were in part security for, and represented in part, the debt due the Garretts, they are entitled as assignees to a proportion of the dividend upon that debt.

It cannot be denied that this would be the measure and extent of their rights, if they held the notes merely as endorsees after maturity; but it is supposed that the power of sale, conferred on the Garretts by the original contract, and the execution of that power confers on the purchasers, different and better rights, and that they are entitled as purchasers to prove for the whole amount of the notes. It does not seem to me that this position is sound.

If the notes had been passed to a *bona fide* endorsee for value before maturity, the rights of the holder would be protected by the law merchant. But that is not the position of Drexel, Morgan & Co. They took them after maturity, with full knowledge of all the facts, and whether they acquired them by endorsement or by purchase from the Garretts, I think they can claim no greater or better right than could be asserted by the original holders.

With respect to the claim of Joshua G. Harvey, I have reached the conclusion, after a careful examination of the proof contained in the record, that he stands in no better position than Drexel, Morgan & Co. He purchased the notes before their maturity, but under circumstances which, in my judgment, charge him with notice of the infirmity in the paper, and deprive him of the protection which the law throws around an innocent endorsee without notice.

It is not necessary, in order to impeach the title of the endorsee to prove express notice or knowledge. If the facts are such as necessarily to cast a shade on the transaction, and to put him on inquiry, the knowledge will be imputed to him. *Story on Prom. Notes*, sec. 197; *Magruder vs. Peter*, 11 G. & J., 217; *Price & Bevan vs. McDonald*, 1 Md., 403; *Smoot vs. Andrews*, 19 Md., 398; *Green vs. Early*, 39 Md., 223.

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 Kremelberg vs. Kremelberg.
 

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In my opinion Account L is correct in so far as it allows a dividend upon the actual debt due from Woods, Weeks & Co. to the Garretts, and distributes that dividend between the Garretts, Drexel, Morgan & Co. and Harvey, in the proportion between the balance due the Garretts, and the notes held by Drexel, Morgan & Co. and Harvey who claim as assignees.

Entertaining these views, I respectfully dissent from the opinion of the majority of the Court.

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## GERTRUDE J. KREMELBERG vs. JOHN D. KREMELBERG.

*Proof of Adultery—When Lapse of time in applying for a Divorce, and a deed of Separation between the parties, constitute no bar to the Divorce—Covenant in Deed of Separation for support of the Wife, not vacated by a Decree of Divorce, obtained at the instance of the Husband—When custody of the Children will be awarded to the Father after a Divorce.*

Direct proof of adultery, that is, evidence of eye-witnesses, is not required, for such is the nature of the offence, and the secret and clandestine manner in which it is committed, that such proof is in most cases unattainable; yet where it is sought to be inferred from circumstances, they must lead to the conclusion of guilt by fair and necessary inference.

Under the facts as stated in the opinion of the Court, it was held, that neither the delay on the part of the complainant in making his application for a divorce from his wife for infidelity, of which he had full knowledge for a long time previous, nor the execution of a deed of separation, nor the circumstances under which it was made, whether considered separately or together, constituted any bar to the divorce sought. (C. C. C. & C. 4 C.)

Where in a deed of separation between husband and wife, the former with full knowledge of the latter's adultery, voluntarily covenants with her father, a party to the deed, to pay to her for her personal

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Kremelberg vs. Kremelberg.

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support and maintenance, a certain sum annually during his life, such covenant is not avoided by a divorce *a vinculo matrimonii* obtained at the instance of the husband; it may still be enforced.

Where a husband upon his application is divorced *a vinculo matrimonii* from his wife on the ground of her adultery, the care and custody of the children are properly awarded to the father.

APPEAL from the Circuit Court of Baltimore City.

The opinion of the Court, together with the dissenting opinions, furnish a statement of the case.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ALVEY and ROBINSON, J.

*Bernard Carter* and *I. Nevett Steele*, for the appellant.

*Charles Marshall*, *Samuel H. Tagart* and *William F. Frick*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

This is a bill filed by the appellee against his wife, the appellant, for a divorce *a vinculo*, on the ground of adultery; and this appeal comes to us from a decree of the Court below, by which the marriage was dissolved, the custody of the children awarded to the complainant, and a certain deed of separation vacated.

The parties to this controversy were married in Baltimore City, in the year 1862; and the issue of that marriage was a son and two daughters, all of whom are now living.

In the summer of 1871, the complainant took his wife and children to Europe and returning to this country in April following, he left them in Bremen, his native place, with his family.

The bill charges adulterous intercourse between the appellant, and a certain Baron Von Brunneck, in Switzerland, in the month of August, 1873. And the first

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Kremelberg vs. Kremelberg.

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question is, whether this charge is sustained by the testimony?

The burden of proof is upon the complainant, and the evidence must establish affirmatively that *actual adultery* was committed, since nothing less than the *carnal act* itself can lay the foundation of a divorce for adultery.

Direct proof, that is, the evidence of eye-witnesses, is not required, for such is the nature of the offence and the secret and clandestine manner in which it is committed, that proof of this kind is in most cases unattainable; yet where it is sought to be *inferred* from circumstances, the latter must lead to the conclusion of guilt by fair inference, as a necessary conclusion. *Loveden vs. Loveden*, 4 Eng. Ecc. Rep., 461.

As to what facts shall, and what shall not, constitute proof of adultery, no general rule can be laid down, because the same presumptions do not always follow the same facts, the weight of presumptions depending upon the character, habits and situation of the parties.

The only general rule to be laid down on the subject, says Lord STOWELL,

"Is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a harsh and intemperate judgment, moving upon appearances that are equally capable of two interpretations; neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man. The rational and legal inferences from such facts must be the same." *Loveden vs. Loveden*, 4 Eng. Ecc. Rep., 462.

Artificial and technical rules, however, afford but little aid in determining questions of this kind, for after all, the question of guilt or innocence depends upon the facts and circumstances of each particular case.

Assuming then in this case, that the respondent is innocent of the offence charged against her, and recognizing

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Kremelberg vs. Kremelberg.

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in their broadest sense, the liberal and humane principles by which evidence in cases of this kind is to be considered, and painfully sensible of the consequences necessarily resulting from the judgment about to be rendered, we are obliged to say, after a deliberate consideration of all the testimony in the record before us, that the charge of adultery against the respondent has been fully and conclusively established.

It would serve no good purpose to review in detail, the proof upon which this conclusion has been reached, and we shall content ourselves by saying that it is based upon facts and circumstances of the most conclusive character—upon the secret correspondence between the respondent and Von Brunneck, and her own declarations to her husband, when confronted with this correspondence, “that she loved Von Brunneck next to her God,” “that she believed he had been sent into this world to make her happy,” “and that she would not give him up.”

It is impossible to reconcile the testimony before us with the innocence of the respondent, and we must therefore infer her guilt. 2 *Bishop on Marriage and Divorce*, 620.

Assuming then that the charge of adultery has been established, the question is whether any reasons exist why the complainant should not be entitled to a divorce?

It is true a husband may forgive his wife, however flagrant may have been her guilt, and it is equally true that if he has forgiven her, such forgiveness will constitute a bar to a bill for divorce.

We do not understand it to be contended, that there has been any forgiveness or condonation in express terms on the part of the complainant; but the argument is, that the lapse of time between the discovery of his wife's guilt, and the filing of this bill, a period of three years and a half, taken in connection with the deed of separation of October, 1874, and the circumstances under which it was executed, amount in fact to a condonation of the

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Kremelberg vs. Kremelberg.

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offence, and constitute therefore a bar to the relief now prayed.

No case has been referred to in which it has been held that the mere lapse of time will in itself operate as a bar to a divorce, on the ground of adultery; and we apprehend none can be found, unless it be cases based upon statutory provisions. *Ferres vs. Ferres*, 1 *Hag. Con. Rep.*, 130; *D'Aquilar vs. D'Aquilar*, 1 *Hag. Eccl. Reps.*, 773, 3 *Eng. Ec. Reps.*, 329; *Cood vs. Cood*, 1 *Curteis Ec. Reps.*, 755, 6 *Eng. Eccl. Rep.*, 452.

Where a party has slumbered on his rights, and with full knowledge, has seemingly acquiesced in the wrong or injury done him, a Court of equity will lend an unwilling ear to his complaint. "The first thing" says Lord STOWELL, "the Court looks to when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal fact charged and known by the party, because if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complainant, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretations."

Nor do we understand that it is contended, that a deed of separation will in itself constitute a bar. This question was argued by eminent counsel, and fully considered in *J. G. vs. H. G.*, 33 *Md.*, 401, and it was held that a voluntary deed of separation did not operate as a bar to a petition for divorce. And in support of this, the Court refers to a number of English decisions, and we have not been able to find a case in which a contrary doctrine has been held.

So we think it is quite clear that neither lapse of time nor mere articles of separation will, when separately con

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Kremelberg vs. Kremelberg.

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sidered, operate as a bar ; and it is equally clear we think, that they cannot have this effect when combined, unless there be other circumstances to show that the application was not made *bona fide*, but for some sinister or collateral purpose. *Matthews vs. Matthews*, 1 Swab. & Trist., 161.

But whatever presumptions may arise in this case from lapse of time, and whatever explanation may be required of the complainant, in regard to the causes of this delay, and the good faith in which his application is made, the proof in the record fully and satisfactorily shows the motives, feelings and convictions, by which he was governed in all he said and did from the moment he discovered his wife's infidelity, to the filing of the present bill.

To understand these, it will be necessary to refer briefly to some of the facts tending to explain the motives by which he was governed.

As we have seen, the complainant left his wife and children in Europe. In the summer of 1873 he went back to meet them, and to bring them home on his return. Immediately upon his arrival at Baden, he discovered the evidences of his wife's adulterous intercourse with Von Brunneck, and from that moment all conjugal relations between them ceased. So soon as the necessary arrangements could be made, he sailed with his wife and children for New York, having written before his departure to her father, Mr. Jenkins, to meet them upon their arrival. Mr. Jenkins did not however meet them, and the complainant came to Baltimore with his family, but instead of going to his own house, he took them to the Carrollton Hotel, where at his request they were met by Mr. Jenkins.

In the interview that followed, the complainant insisted : 1st. That his wife should go to her father's house and remain there six months under the observation of Mrs. Jenkins, who at the end of that time was to report to the complainant as to her deportment.

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Kremelberg *vs.* Kremelberg.

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2nd. That his son should live with him.

3rd. That the two girls should live with their grandfather in the same house with their mother, not under her care but under that of Mrs. Jenkins.

After some discussion these demands were reluctantly acceded to by Mr. Jenkins. This arrangement was made for the purpose of not only testing the character and deportment of his wife, but also his own feelings, and to ascertain whether it was possible to forgive her offence and take her back as his wife. It is obvious that the complainant was most anxious to avoid the scandal, shame and mortification to his children and himself, resulting from the exposure of his wife's infidelity.

At the end of the appointed time Mrs. Jenkins made a satisfactory report in regard to Mrs. Kremelberg's character and deportment, and thereupon her father made a formal application to the complainant in behalf of his daughter for a restitution of her conjugal rights. This being refused, a similar demand was made by Mr. Wallis as counsel for the wife. Then for the first time the complainant determined to disclose the reasons for his refusal, and placed the secret correspondence between his wife and Von Brunneck, in the hands of his counsel, Messrs. Brune and Tagart. This correspondence was submitted by them to Mr. Wallis, and thereupon the demand for the restitution of the conjugal rights of the respondent was abandoned, and negotiations ensued which resulted in the execution of the deed of separation.

By this deed it was agreed that the parties should live separate; that the complainant should have the custody of his son; that the eldest daughter should be sent at once to a boarding school to be selected by the mother; that the youngest daughter should remain with her mother, until she was seven years of age, and then to be sent to a boarding school, likewise to be selected by the mother; and that the complainant should pay to his



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Kremelberg vs. Kremelberg.

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wife two thousand dollars annually for her support and maintenance, Mr. Jenkins agreeing to protect the complainant from all debts contracted by his daughter.

With the exception of a visit by the respondent to the house of her husband, for the purpose of inducing him to restore her again to the relations of a wife, the separation effected by this deed continued without interruption, until the youngest daughter reached the age of seven years.

A demand was then made by Mr. Kremelberg upon Mr. Jenkins, who was also a party to the deed of separation, that the little girl should be sent to school in accordance with the agreement. To this Mr. Jenkins replied by saying, that he had requested Mrs. Kremelberg to send the child to school, but that if she continued to refuse, he had no means of enforcing the obligation. He further says in the letter.

"I am advised by my counsel that I have no right to the custody of the child or to demand it of the mother under the agreement of separation. Mr. Kremelberg clearly has that right, and the only right of Mrs. Kremelberg is to say to what institution the child shall be sent when in his custody." Thereupon the counsel for complainant applied directly to Mrs. Kremelberg to carry out in this respect the provision of the articles of separation.

To this demand a letter was received from Mr. Carter, who in the meantime had been employed by the respondent as counsel, saying that the child had been under the treatment of a physician, but that Mrs. Kremelberg would place her at school immediately after the Easter holidays. In concluding the letter, Mr. Carter further says that Mrs. Kremelberg considers "according to the fair interpretation of said agreement of separation, she is entitled to the society and care of her two daughters during their vacations, and such times as they are not at school."

It can hardly be necessary to say that this construction of the articles of separation was a surprise to the complain-

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Kremelberg vs. Kremelberg.

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ant. As understood by him, and by Mr. Jenkins, the father of the respondent, who was also a party to the deed, and by her counsel Mr. Wallis, by whom the deed was prepared, Mr. Kremelberg was entitled to the custody of the daughters, and the only right of the wife under the deed was to select the school to which they should be sent.

It must be borne in mind, that we are now considering the motives by which the complainant was governed in his application for a divorce, and his understanding of the deed is of more importance than the strict legal construction of the paper itself, for the reason that it derives its chief importance in this connection from the light it is supposed to cast upon the feelings and intentions of the parties, rather than the rights derived under it.

The complainant was thus confronted by the claim of his wife under the deed to the exercise of a larger authority and control over the daughters than she "could have asserted without the contract, for if she was entitled to their custody when not at school, and she proposed to exercise this right living apart from her husband, it was equivalent to the exclusive custody of the daughters while not at school."

If such was the legal effect of the deed, the complainant saw at once how utterly it had failed to accomplish what he intended, and that instead of narrowing the control of the mother over the daughters, it had restricted the exercise of the rights and authority over them to which he was entitled as a father. Now the obvious motives by which he was governed in all he did, was to prevent the shame and disgrace to his children and himself, that would result from the exposure of his wife's infidelity, and to preserve to himself the care and custody of his children so far as this could be done consistently with their ages and condition.

What then was he to do? Either to submit to the construction thus placed upon the deed and surrender them

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Kremelberg vs. Kremelberg.

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to the custody of his wife, or to take some steps, by which his rights as a father might in this respect be asserted.

The object of the deed as it recites was "*to avoid painful litigation, and for the happiness and interest of their children and of all concerned.*"

In view, however, of the construction thus placed upon it by the wife, the deed had failed to answer the purposes for which it was intended, the "painful litigation" was no longer to be avoided, for any proceeding instituted by him in regard to the custody of his daughters would necessarily involve the causes and circumstances under which the deed was executed, and the exposure of his wife's adultery, "which for the happiness and interest of his children and of all concerned" he had been so anxious to prevent. An application for a divorce then based upon the guilt of his wife, and the rights resulting to him therefrom, became a natural and necessary proceeding.

This brief review of the testimony fully explains the objects and purposes of the Carrollton arrangement—of the deed of separation—the reasons why the complainant did not file a bill for divorce, upon the discovery of his wife's guilt, and the causes which finally made such a bill a necessary and proper proceeding. Instead of bad faith, it shows that throughout the trying and painful situation in which he was placed, he exhibited in all he said and did, a discretion, forbearance and unselfish consideration for the rights and feelings of others, not often to be found in cases of this kind. Instead of forgiving, or condoning his wife's infidelity, it shows that from the time he first discovered it, all conjugal relations between them ceased, and however anxious to avoid its publicity, against her entreaties and the entreaties of others, he refused to recognize her again as his wife. Under such circumstances, we are of opinion that neither the delay in making the present application, nor the execution of the deed of separation, nor the circumstances under which it

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Kremelberg *vs.* Kremelberg.

---

was made, whether considered separately or together, constitute any bar to the divorce now prayed.

We come now to the question, and the only question in regard to which we have had any difficulty, and that is, what is the legal effect and operation of the divorce upon the deed of separation?

It is hardly necessary to say, that both Courts of law and equity have uniformly refused to recognize the validity of voluntary deeds of separation, so far as they undertake to release the parties from the duties and obligations resulting from the marriage contract. This the parties have no power to do.

It can only be done in the mode and in the manner prescribed by law, and for causes recognized by law. Any private understanding or agreement, says Sir JOHN NICHOLL, between husband and wife to live separate, is not recognized by law. *Smith vs. Smith*, 4 *Hagg. Ecc. Rep.*, 514, 609.

But although the deed may be void in this respect, it is well settled that a covenant in such deeds for the support of the wife, if made with trustees in her behalf, and in consideration of indemnity against future debts contracted by her, will be enforced. *Elworthy vs. Bird*, 2 *Sim. & St.*, 372; *Seeling vs. Crawley*, 2 *Vern.*, 386; *Stevens vs. Olive*, 2 *B. C. C.*, 90; *Seagrave vs. Seagrave*, 13 *Ves.*, 439.

The question then in this case is, what is the effect of a divorce for the wife's adultery, which was known to the husband at the time of the execution of the deed upon such a covenant?

It cannot be unlawful for a husband to provide by deed for the support of an erring wife, and if he should subsequently obtain a divorce for adultery, of which he was aware at the time he made the covenant, and the wife has done nothing to forfeit her rights under the covenant, we see no good reason why the divorce should discharge the husband from the obligation he has thus voluntarily assumed.

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Kremelberg vs. Kremelberg.

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Now in this case the complainant with full knowledge of his wife's adultery, voluntarily covenanted with her father, to pay to her two thousand dollars annually during his life. It was undoubtedly a very liberal provision, and more than she had any right to expect. But it was an agreement voluntarily and deliberately made by the complainant. There is no proof, nor is there any intimation that the wife has been guilty of a repetition of the offence which has been the source of all this trouble. And although the deed of separation does not operate as a bar to the application for divorce, we see no inconsistency in granting a divorce, and at the same time refuse to release the husband from a covenant providing for the support of his wife.

The deed does not provide for the payment of the annuity so long as the respondent should remain as his wife, nor that it is to be discharged upon a divorce of the parties. The fact is, at the time the covenant was made, the parties only contemplated living apart, and did not therefore make any provision upon the contingency of a divorce.

The case of *Charlesworth and another vs. Holt*, 29 *Law Reporter*, (N. S.) (*Law Times Reports*,) 647, goes much further than this. There the deed of separation after reciting that unhappy differences had arisen between the parties, in consequence whereof, they had agreed to live separate, further provided, that the husband should pay a certain annuity to his wife during their joint lives.

Upon a suit brought upon this deed, the husband pleaded, that after its execution, the plaintiff, his wife, had committed adultery with one Samuel Oxley, and that in consequence thereof, he had obtained a divorce dissolving absolutely the marriage. This plea was held, on demurrer, by KELLY, C. B., BRAMWELL and FIGOTT, B., to be a bad plea.

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Kremelberg vs. Kremelberg.

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KELLY, C. B., said :

"I am of opinion that the judgment of the Court in this case should be given to the plaintiff. It appears to me that all the authorities are one way." And in reply to the argument of Mr. HOLKER, Q. C., that it would be inexpedient, unreasonable and unjust, that a woman, who by reason of her own wilful and unjustifiable act of adultery has been divorced, should nevertheless continue to receive an annuity from, and to be supported by, the person, who had previously to the divorce, stood towards her in the relation of husband, the Judge said :

"That may be so, as a matter of reasoning, but the answer to it as an argument for our doing what we are here called upon to do, is shortly and simply this, that the Court has no power to introduce any such condition into this deed, however proper and reasonable in a moral and social point of view it might be to do so."

PIGOTT, B. "The contingency of adultery being committed by either of the parties, was evidently not contemplated by any one when the deed was executed, and therefore the Court cannot introduce into the deed a condition not already there."

We have quoted somewhat at length from this case, to show that it goes much further than is necessary in the case before us. Without being understood as adopting all that was said by the Judges, we have referred to it for the purpose of showing that so late as 1874, it was held in England, that a divorce for the wife's adultery did not discharge the husband from liability, on a covenant in a deed of separation, providing for the payment of an annuity to his wife.

In regard to the care and custody of the children, no good reason has been shown why the Court should interfere with the natural rights of the father in this respect.

It follows from what we have said, that so much of the decree below as dissolves the marriage of the complainant

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Kremelberg vs. Kremelberg.

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and respondent, and grants a divorce *a vinculo matrimonii* to the complainant, and awards the care and custody of the children to the complainant, will be affirmed; but that so much of the decree as sets aside the deed of separation in respect to the payment of the sum therein provided to the respondent, will be reversed.

*Decree affirmed in part, and  
reversed in part, and  
cause remanded.*

(Decided 17th July, 1879.)

BOWIE, J., filed the following dissenting opinion:

The decree from which this appeal is taken annulled the marriage of the complainant and defendant, and divorced the former from the latter, "*a vinculo matrimonii*." It ordered and decreed that the children of the parties divorced, be committed to the care and custody of the complainant, their father, until they shall respectively attain their legal majority; and further adjudged and decreed, that the deed or articles of separation mentioned in the proceedings, dated the 31st day of October, 1874, between the complainant, John D. Kremelberg, of the one part, and the respondent and Joseph W. Jenkins of the other part, be vacated and annulled. This decree implies and involves the exercise of the several and respective powers, both of Courts of Divorce and Courts of Chancery.

Matrimonial causes belonged originally to Ecclesiastical Courts, by which the power of divorce was exclusively exercised. The temporal Courts, had the sole cognizance of examining and deciding directly upon all the temporal rights of property. *Shelford on Mar. & Divorce*, ch. 6, p. 459, *Eng. Edition*, London, 1841. Ecclesiastical Courts rarely recognized the existence or validity of deeds of separation, and never exercised the power of vacating them. On the other hand, it is the peculiar province of Courts of

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Kremelberg vs. Kremelberg.

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Chancery to enforce or set them aside. But Ecclesiastical Courts, in determining the right of either party to divorce, incidentally considered the execution of a deed of separation as an important fact in the case of the complainant. Prior to the adoption of the Constitution of 1851, the granting of divorces was a regular exercise of legislative power, notwithstanding the authority vested in the Courts of equity to divorce *a mensa et thoro* and *a vinculo*; but by the provisions of that instrument, and all succeeding Constitutions of this State, the General Assembly is prohibited from passing special Acts of divorce, thus indicating that the rights created by the sacred and solemn contract of marriage shall not be dissolved by arbitrary legislative will, however wisely directed; but only according to the principles of Courts of justice, long established, previously ascertained and judicially administered.

It was said by this Court in *J. G. vs. H. G.*, 33 Md., 406, that a Court of equity in this State, on applications for divorce "sits, not in the exercise of its general and ordinary equitable jurisdiction, but as a Divorce Court; and must be governed by the rules and principles established in the Ecclesiastical Courts in England, wherein a similar jurisdiction has been exercised, so far as they are consistent with the provisions of the Code."

Until the year 1858, the Ecclesiastical Courts of England possessed no power to divorce "*a vinculo*" for adultery, but could only grant divorces "*a mensa et thoro*;" hence, for the law of divorce "*a vinculo*," we must look to the law of Parliament, which to a certain extent may be regarded as the highest Court in England in matrimonial causes, whether they exercise their power in a legislative or judicial capacity.

In the comparatively brief period which has elapsed since the Courts of equity of this State, have acquired jurisdiction in cases of divorce "*a vinculo*," few cases, if any, have occurred, distinguishing the exercise of the



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Kremelberg vs. Kremelberg.

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power of total divorce, from that of partial divorce, or establishing rules which would govern in the one, and do not in the other. The effect of the decree in the one case, being widely different and more extensive than in the other, Courts would be greatly misled, if they indiscriminately adopted rules designed in cases for partial divorce, as applicable to cases for a total divorce.

Upon the question of the effect of the deed of separation upon the right to a divorce, this Court declared in the case before cited from the reference to the precedents in the English Ecclesiastical Courts, "it appears to have been long settled, that a voluntary deed of separation between husband and wife, is not '*per se*' a bar to a suit in the Ecclesiastical Court for a restitution of marital rights, or to a petition for divorce," citing *Durant vs. Durant*, 1 Hagg. 733, (3 Eng. Eccl. Rept., 310;) *Beeby vs. Beeby*, 1 Hagg. 789, (3 Eng. Eccl. Rept., 338;) *Westmeath vs. Westmeath*, 2 Hagg. Supp., 1, (4 Eng. Eccl. Rept., 238;) *Spering vs. Spering*, 3 Swab. & Trist., 211; *Hunt vs. Hunt*, 32 L. J., 168.

"Some cases (the Court continues) have arisen upon applications for divorce in the Ecclesiastical Courts, in which a voluntary deed of separation between the parties, has been considered in connection with lapse of time, and other circumstances as sufficient to show the application was not made *bona fide* for the cause assigned; but for some sinister or collateral purpose, and the application for that reason, has been denied." Such were the cases of *Matthews vs. Matthews*, 1 Swab. & Trist., 499, and *Williams vs. Williams*, 35 Law Journal, 85.

In *Matthews vs. Matthews*, the deed of separation, was executed in 1853, between George Matthews of the one part, and Stephen Clark, brother of Ann Matthews the wife of the other, reciting that differences had arisen between Matthews and his wife, and they were mutually desirous to live separate; that it had been agreed between

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Kremelberg *vs.* Kremelberg.

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Matthews, and Clark as the brother, and on behalf of Ann Matthews, that Clark should indemnify Matthews, against all liability for the debts of his wife, and that Matthews, in consideration of such undertaking, etc., would permit his wife to live apart as if she were *fême sole*, and have entire custody and control over her children. The wife petitioned in 1856 for a divorce on the ground of cruelty, committed by her husband prior to the deed. It was held, that although the lapse of time was not an absolute bar, yet taken in connection with the deed of separation, it showed, that it was not a *bona fide* application made for the protection of the wife, but for some collateral purpose, and that the Court ought not to grant the prayer of the petition. This case is strongly analagous to that now before us. The distinguishing features are, that the application for divorce proceeded from the wife, and not the husband, and the ground of complaint, was cruelty, not adultery.

From these authorities, which might be indefinitely multiplied to the same effect, it would appear, that however well grounded the charge, if the complainant sleeps upon his rights, or, knowing his wrongs, enters into agreements and obligations, inconsistent with the presumption of their actual existence, or treats with others, upon the implication of their non-existence, he thereby waives his right to the remedies which the law otherwise extends to him. And although deeds of separation, are not *per se*, a plea in bar to an application for a divorce, according to these authorities, yet, united with the lapse of time, unexplained and unaccounted for, they constitute sufficient ground to justify the Court in refusing the extreme remedy.

In applications for divorce, the question for the consideration of the Courts, is not solely the guilt or innocence of the accused, but whether the complainant has so demeaned himself or herself, as to be entitled to the intervention of the Court.

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Kremelberg vs. Kremelberg.

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Although the guilt of the accused must be satisfactorily established, to entitle the complainant to a divorce, it does not necessarily follow in any particular case, that the Court should decide that question in determining whether the complainant is entitled to relief. The controlling preliminary inquiry, is the conduct of the complainant after his supposed wrongs, involving it may be his belief in the truth of the charge, and concluding his rights in the premises, according to the covenants and agreements he may have entered into, and the vigilance he has shown in asserting them.

The bond of marriage cannot be dissolved without involving both the innocent and guilty, in opprobrium and disgrace. The children of the marriage (if any) must incur more or less of the stigma which attaches to the delinquent parent. Humanity, justice and sound policy dictate, that all deeds, and covenants, devised and executed for the purpose of preserving domestic peace and private character from reproach, protecting the innocent issue from the dishonor of defiled nuptials, and securing the sacred bond of society from judicial dissolution, should be favored and enforced.

As we have said the Ecclesiastical Courts of England, possessed no power to divorce "*a vinculo*," for adultery, until the year 1858; prior to which adultery was a cause of divorce "*a mensa et thoro*," and deeds of separation, were not *per se*, a bar to such divorces. But, in the House of Lords, articles of separation were held to form an insuperable bar to the special interposition of the Legislature, on an application for a divorce. *Shelford on Mar. & Div.*, 383; 33 *Hans. Par. Deb.*, 1306, 1308, in *Esteney Divorce*, 1798. In this case, the articles were made in ignorance of the wife's gross misconduct, and before it had occurred, yet the Lord Chancellor said the articles formed an insuperable bar to any divorce, and the circumstances of collusion which appeared in the case rendered it the duty of

the House to reject the application. *Ibid.* What the circumstances of collusion in that case were, which induced the Chancellor to advise the rejection of the application, is not reported; but it is obvious they were independent of the articles which are spoken of as a distinct ground of objection. These being made before the misconduct of the wife, and in ignorance of it, must have operated *per se*, according to some rule of policy, which Parliament had adopted and prescribed. "The husband was held to be deprived of his right to a divorce in Parliament, by a letter offering £200 a year for the separate maintenance of his wife, and agreeing to articles of separation, and to give up the adulterous connexion." *Pang's Divorce, House of Lords*, 28 Mar., 1838; *Shelford on Mar. & Divorce*, 383.

The great end and motive for the execution of articles of separation between husband and wife is, to avoid litigation, suppress scandal, provide for the maintenance of the wife, the support and education of the children (if any) and to exonerate the husband from future liabilities. To compose domestic strife, by private compact and treaty of peace, rather than resort to the arbitrament of Courts.

The maintenance of the wife is a substitute for alimony, which is always granted her when she is divorced upon her application, and which is always forfeited when she is divorced "*causa adulterii*."

A deed, reciting that husband and wife have had unhappy differences and "have been separated, and living separate and apart for nearly a year past, and still are, and in order to avoid painful litigation, and for the happiness and interest of their children, and of all concerned have agreed as a settlement of all differences and causes of differences between them, to continue to live separate and apart henceforth, on the terms set forth therein," is a solemn and perpetual covenant, not to be annulled, except in extreme cases. It is an express admission that the wife is, as wife, or by virtue of covenants and considerations

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Kremelberg vs. Kremelberg.

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therein contained, on her part, or in her behalf, entitled to the provision therein made for her, and to enjoy it in peace and quietness, without reproach or litigation. It is a pledge, that for the happiness and interest of their children, all differences and causes of difference should be buried in oblivion.

In weighing the claims of the husband, to the remedy of divorce "*a vinculo*," which depends as much upon the conduct of the accuser, as that of the accused, such a deed must be considered as a most controlling circumstance, whether we regard it as an implied admission that the wife is innocent of the most odious offence she can commit against her husband; or as a covenant for valuable considerations, to waive all such imputations, and secure her peace and quietness, with an adequate allowance during her husband's life. Standing alone, without connection with prior or subsequent relations between the principal parties, the provisions of the deed are irreconcilable with the theory, that the grantor then believed himself the victim of conjugal infidelity. Taken in connection with the declarations and conduct of the complainant, prior and subsequent to the execution of the deed of separation, such a conclusion is incredible.

At the interview between the complainant and his father-in-law, and brother-in-law, immediately upon his return from Europe, in a family council in which his domestic grievances were first exposed to them personally; to the direct questions of both of these gentlemen, whether he meant to impute to his wife, dishonor or criminal conduct, he emphatically declared he did not. The probation of six months, under the surveillance of her stepmother, to which he subjected his wife, in order that he might in that time in the language of the bill of complaint, "*test his feelings towards her*," with the understanding, (according to the testimony of his sister-in-law) if her temper and general behaviour were good, that he would take her

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Kremelberg vs. Kremelberg.

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back as his wife; the lapse of fourteen months between the date of the alleged causes of divorce and the execution of the deed of separation with full knowledge of all that had transpired; the deliberate execution of the deed, containing provisions which virtually repudiated the main ground of accusation; acquiescence for two years and a half afterwards, in the terms of separation, and payment of the allowance stipulated, combined, constitute such an "*estoppel in pais*," as cannot be evaded or overcome.

On the other hand, regarded as a private treaty between the parties, made for a valid and good consideration, to protect innocence and infancy, suppress scandal, avoid litigation and preserve domestic peace, we can perceive no reason why it should be annulled and vacated. The weight of authority, in our opinion, decidedly forbids it.

"In *Blount vs Winter* and *Winter vs. Blount*, July 19th, 1781, the original bill was filed by trustees in marriage articles and the children of the marriage, against the husband and wife, and the cross-bill was filed by the husband against the wife and children—the original bill prayed a performance of the articles, and the husband by his answer to the original bill and by the cross-bill resisted the performance so far as the articles made provision for the wife, alleging and proving in the cross cause, that she lived separate from him in adultery. The Court was of opinion that this was not a reason for non-performance of the articles as to the wife, and made a decree accordingly in the original cause, and dismissed the cross-bill without costs." *Reg. Div. A*, 1780, fol. 550; 3 *Peere Williams*, 276, note 2.

In the cases of *Wright vs. Miller*, in the Court of Chancery of New York, which were cross-bills to set aside certain conveyances of real estate, and two decrees affecting the same, the question of the effect of a divorce upon an annuity previously settled on the wife, was incidentally involved. The Chancellor said, "It was suggested by

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Kremelberg vs. Kremelberg.

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Mrs. Miller's counsel that she received the annuity by sufferance merely, and that it was cut off by divorce. I apprehend that the divorce did not affect it at all." (See *Sidney vs. Sidney*, 3 P. Wms., 269; *Blount vs. Winter*, Id., 276, note by Cox; *Field vs. Serres*, 1 Bos. & Pul., New Rep., 121; *Shelford on Mar. & Divorce*, 421-2; *Roper's Husband & Wife*, by Jacob, 134, 137,) 1 *Sanford's Chy. Rep.*, 126. The case of *Jee vs. Thurlow*, 2 Barn. & Cress., 547, is to the same effect. "By a deed of three parts, between husband and wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower and thirds. It was held that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Courts for restitution of conjugal rights, and that he put in an allegation and exhibits charging her with adultery, and that a decree of divorce '*a mensa et thoro*' was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity." The principal contention in this case was, whether the policy of the law would sanction a provision for future separation, but all the Judges, ABBOTT, C. J., BAYLEY, HOLROYD, and BEST, J. concurred that where separation had already occurred, and the husband had entered into covenants for the future, in consideration of covenants "*in case of the husband*" the husband was bound unqualifiedly. BEST, J., said, "Whatever opinions Judges may have entertained as to the policy or impolicy of such contracts as this, it would be a strong measure for us, on the mere ground of policy, to overthrow former decisions, when Lord ELDON, sitting in the House of Lords, did not feel himself strong enough to do so."

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Kremelberg vs. Kremelberg.

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In a very recent case in the Court of Exchequer, before KELLY, C. B., and BRAMWELL and PIGOTT, B. B., in an action upon a bond or deed whereby the defendant covenanted to pay trustees for the wife, during the joint lives of the husband and wife, and so long as they shall live separate and apart; it was held that the fact of the wife's subsequent adultery and her divorce, and the consequent dissolution of the marriage by a decree, etc., are no answer to an action by the trustees for the arrears of the annuity. KELLY, C. B., said: "I am of opinion that the judgment of the Court in this case should be given for the plaintiff. It appears to me, all the authorities are one way. There is not a shadow of authority in favor of the proposition which Mr. Holker, on the part of the defendant, has contended for before us, that any Court of law can introduce words into a deed, so as to alter the express terms of the covenant contained therein." 29 *Law Times*, N. S., 649.

Regarding this case from the standpoint in which the husband viewed it, when he executed the articles of separation, for high moral and valuable considerations, we can find no sufficient cause to authorize a Court of divorce to dissolve the marriage tie, or a Court of equity to vacate the solemn compact for the preservation of the interests and happiness of all concerned, and the maintenance of the mother, and education of their children. In the language of Chancellor JOHNSON, in the case of *Brown vs. Brown*, 5 *Gill*, 255, affirmed by this Court, having selected their own remedy by the execution of this deed, after an actual separation for years, no sufficient reason has been assigned, why this Court should be called upon absolutely to dissolve the marriage.

"It is not alleged or proved, that any circumstances have transpired since the execution of the deed which render it necessary or proper that the relations of the parties as established by that instrument, should be changed, and the Court would be most reluctant to do so, especially in



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Kremelberg *vs.* Kremelberg.

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the manner and to the extent proposed by this bill, unless a case of strong urgency was made out, as the effect of such a change upon the rights secured by the deed, might occasion embarrassing, if not injurious consequences."

ALVEY, J., filed the following dissenting opinion :

I dissent from the opinion of the majority of the Court in this case, and agree with Judge BOWIE, that the decree of the Court below should be reversed, and the bill dismissed.

Whether the wife be guilty of the offence charged against her by her husband, is a question in regard to which I give no opinion; nor do I think it necessary to declare the innocence of the wife, in order to conclude that the husband has no proper standing in Court.

The offence of which the wife is charged, if she be guilty, was committed in the summer of 1873; all the evidences of that offence, upon which the charge is made, became fully known to the husband in the latter part of the summer of that year; and he and his wife returned from Europe to Baltimore in the fall following. Upon their return to Baltimore they at once separated, and lived apart. This was at the instance of the husband, and, according to the evidence, one of the objects of separation was, that the husband might have time within which to test his feelings, with the view of possible reconciliation. After the lapse of nearly a year, the deed of separation of the 31st of October, 1874, was executed by the parties. That deed was made with full knowledge of all the circumstances of the case, and after the lapse of sufficient time not only for fully testing the feelings but for the most deliberate consideration, it was made, moreover, under the advice and direction of very prudent and discreet counsel, after weighing and considering all the facts of the case, and determining what was best and most

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Kremelberg vs. Kremelberg.

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judicious for all the parties concerned, the children as well as the parents. The motives and reason for making the deed are fully and clearly set forth on the face of the deed itself; and there is no reasonable ground whatever shown for breaking up this family settlement of their unhappy differences. The deed recites "that whereas the said John D. Kremelberg and Gertrude J. Kremelberg, his wife, have had unhappy differences, and have been separated and living separate and apart for nearly a year past, and still are, and in order to avoid painful litigation, and for the happiness and interest of their children and of all concerned, have agreed as a settlement of all differences and causes of differences between them, to continue to live separate and apart henceforth, on the terms set forth in this deed of separation." Under this deed, the parties continued to live separate until the 29th of March, 1877, when the present bill was filed;—a period of nearly two years and a half from the time of making the deed, and nearly three years and a half from the time of their return from Europe, and after all the evidence upon which the present application is founded had become fully known to the husband. It is not alleged, nor is it pretended to be shown in proof, that there has been any subsequent disclosure affecting the chastity of the wife; nor is it pretended that there was any difficulty or obstacle whatever in the way of producing all the proof now relied on immediately after their return from Europe. It is abundantly shown, by the proof produced by the husband himself, that the character of the wife for chastity and virtuous deportment, both before and since the summer of 1873, was and has been most exemplary, and above all reproach. Why then, after all this delay, and after the settlement of all differences by the execution of the deed of separation, with full knowledge of all the facts of the case on the part of the husband, should this application be made for the dissolution of the marriage, and the vaca-

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Kremelberg vs. Kremelberg.

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tion of the deed of separation? I must confess that I am at a loss to understand upon what principle, consistently with authority and established doctrine upon the subject, the present application can be favorably entertained.

While it may be conceded that the husband is not, ordinarily, barred of his right to divorce by reason simply of his having executed a deed of separation and settlement after knowledge of his wife's adultery, yet the fact of such deed does afford a strong ground of opposition; and when coupled with other facts, such as great delay, without sufficient explanation, the bar is rendered complete.

The effect of delay alone is very strong against the application, if not accounted for, by alleging and showing such circumstances as will justify the delay in making the complaint. This is clearly stated by Sir WILLIAM SCOTT, a high authority upon this subject, in his judgment in the case of *Mortimer vs. Mortimer*, 2 *Hagg., Const. Rep.*, 310. That great Judge, acting upon the allegation of a husband charging his wife with adultery, said: "The first thing which the Court looks to, when a charge of adultery is preferred, is the date of the charge, relatively to the date of the criminal fact charged, and known by the party; because, if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, it will be indisposed to relieve a party, who appears to have slumbered in sufficient comfort over them; and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It, therefore, demands a full and satisfactory explanation of this delay, in order to take it out of the reach of such interpretation." So, again, in the case of *Cood vs. Cood*, 1 *Curteis*, 755, upon an application of a husband to be divorced from his wife upon the ground of adultery alleged to have been committed by the latter, Dr. LUSHINGTON, in the course of his

judgment, said: "The principle of this Court, and of all Courts, is, that the husband ought to proceed with such celerity as the case admits of, to obtain the remedy he seeks; but I conceive it is also settled, that if any circumstances occur, which reasonably prevent him from proceeding, he is not thereby debarred from doing so at a time more convenient to him." We have seen what delay occurred in this case before making the application; and the fact of the execution of the deed, when considered in connection with this great delay, without a pretence of any subsequent discovery of facts reflecting upon the question of guilt of the wife, and nothing alleged or proved to show any greater reason or necessity for filing the bill at the time it was filed than existed at the date of the deed, constitutes, in my judgment, a complete bar to relief. In the case of *Brown vs. Brown*, 5 Gill, 249, where husband and wife had actually separated, the wife having deserted and persistently refused to cohabit with her husband for a period of ten years, and afterwards they selected their own remedy by the execution of a deed of separation, and continued to live separate, without any new circumstances transpiring to produce a change in their relations subsequent to the date of the deed, upon the application of the husband, the Court refused to grant a decree *a vinculo matrimonii*, upon the distinct ground that the parties had settled their differences, and that the Court was averse to disturbing in any manner the deed of separation. That was a case, it is true, of abandonment by the wife; but abandonment, equally with adultery, constitutes cause of divorce *a vinculo matrimonii*, under the statute; and the application for the one cause equally as for the other is founded upon the wilful misconduct of the party complained against. The decision just referred to was made by an able Chancellor, the late Chancellor JOHNSON, and upon appeal, his judgment was affirmed by our predecessors in this Court, for the reasons assigned by the

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Kremelberg vs. Kremelberg.

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Chancellor for his decree. The decision in that case has stood as the settled law of this State for the last thirty years; and, as a precedent, I think it is of great force against the present application.

The facts alleged as an excuse or justification for filing the bill, and seeking to break up and get rid of the family settlement of all differences and causes of differences between husband and wife, are, in my judgment, utterly futile. The fact that the wife went to the husband's house after the making the deed, when viewed in the light of attending circumstances, amounts to literally nothing. She went by the advice of a friend to seek reconciliation with her husband, and she only remained one night. Every circumstance, however, attending her short stay, has been greatly colored and magnified, in order to give importance to the fact of the visit. But, if any significance whatever could be justly attached to the fact, it was fully condoned by the husband, when he paid up the subsequent arrears of the annuity under the deed of settlement. And, as to the allegation that the wife neglected or refused to send one of the little children to school, in violation of her duty under the deed, it is abundantly shown that the child was not in a condition to be sent to school; that it was in feeble health, and that the physician attending it had advised against sending it to school until improved in health. And as to the construction of the deed with respect to the control of the two female children, that was a question that could have been easily settled; the mother and her counsel were certainly at liberty to insist upon what they supposed to be a fair construction of the deed, without incurring the hazard of breaking up the entire settlement.

The application was made to the Court below for the exercise of a double jurisdiction. First, that of a divorce Court; and second, that of an ordinary Court of equity. Hence the prayer for a divorce *a vinculo matrimonii*, and

also for the vacation of the deed of separation and settlement.

In the exercise of the jurisdiction over the subject of divorce, the Court below granted the divorce as prayed by the husband, and a majority of this Court have affirmed the decree in that respect; but that part of the decree of the Court below that was passed in the exercise of its ordinary equity jurisdiction, vacating entirely the deed of separation, has been reversed, so far as the same relates to the annuity agreed to be paid to the wife. In this latter part of the decree of this Court I entirely agree, though I am of opinion that the decree appealed from should have been reversed *in toto*. It is very clear, I think, both from decisions in the Courts of common law and those in the Courts of equity, that a deed of separation, so far as its property provisions are concerned, if valid when executed, does not become invalid by reason of the subsequent dissolution of the marriage for adultery committed by the wife before the deed was made. This subject was fully considered in the case of *Evans vs. Carrington*, 2 D. F. & J., 481. And if the deed does not fall as the legal consequence of the dissolution of the marriage, there is clearly nothing in this case that could induce the Court, as there was in the case of *Evans vs. Carrington*, to declare the deed void.

There is another subject upon which I must add a few words, and that is, the omission in the decree of this Court to make any provision in regard to the children, or the right of access to them. By the deed of separation, it was distinctly agreed between the husband and wife, that reasonable access to and enjoyment of the society of their children should continue and be allowed to the parties respectively. This provision in the deed has been stricken down as a covenant between the parties, and the decree of this Court contains no provision upon the subject; and consequently, the mother may be entirely excluded from all access to

Reiff, *et al. vs. Eshleman.* Reiff, *et al. vs. Horst.*

her children. For this I can perceive neither reason nor justice, to say nothing of the natural claims of the mother. In the recent case of *Hill vs. Hill*, 49 Md., 450, this Court ordered the revival of a provision in a decree of divorce, which secured to the mother, upon whose adultery the divorce was granted, a restricted access to her child; and if upon the circumstances of that case it was proper, as it doubtless was, to secure to the mother access to her child, I think liberal access to her children ought to be secured to the mother in this case.

ISRAEL REIFF, and others *vs.* DANIEL ESHLEMAN.  
ISRAEL REIFF and others *vs.* ANNA HORST.

*Affidavit of Mortgagee as required by sec. 29 of Art. 24 of the Code—How affidavit to be established—Insufficient affidavit of Mortgagee—Effect of Recording defective Mortgage—Mortgage subjected to allowance to Wife in lieu of Dower—Claim of Judgment creditor not Subjected—Effect of filing Claim by Judgment creditor to obtain her Proportion in the Distribution of the Debtor's estate.*

The affidavit required by sec. 29 of Art. 24 of the Code, to be made by a mortgagee as to the truth and *bona fides* of the consideration expressed in the mortgage, must be endorsed thereon, and recorded with it; such endorsement is essential to the validity of the mortgage.

The fact that the oath was taken by the mortgagee, can only be established by a formal endorsement upon the mortgage; it is not the subject of parol proof.

A paper attached to a mortgage of real estate situate in Maryland, purporting to be a certificate that an affidavit was made in the State of Pennsylvania by the mortgagee as to the truth and *bona*

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Reiff, *et al.* vs. Eshleman. Reiff, *et al.* vs. Horst.

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*fides* of the consideration in the mortgage, before a person styling himself a Justice of the Peace of the former State, and signing himself, "A. B. Reidenbach, J. P.," but without further attestation, can have no weight, and the mortgage must be considered as one without an affidavit endorsed thereon as required by sec. 29 of Art. 24 of the Code.

The recording of a mortgage without the affidavit of the mortgagee endorsed thereon, as required by sec. 29 of Art. 24 of the Code, does not operate as constructive notice to a subsequent mortgagee; but actual notice of such defective mortgage establishes its priority.

Israel Reiff and John Horst were mortgage creditors of Abraham Horst, and Mary W. Miller was a judgment creditor. Anna Horst united with her husband Abraham Horst in a mortgage dated the 17th of December, 1875, to Israel Reiff, John Horst and Daniel Cearfoss, and in mortgages to other parties. Abraham Horst becoming involved, executed on the 10th of July, 1876, a deed of trust, in which his wife joined, of all his property of every description, to the said Israel Reiff, John Horst and Daniel Cearfoss, stipulating for its sale, and for the payment, first, of all liens and incumbrances according to their priority, and secondly, of all the other debts of the said Abraham Horst, without any preference or priority among them. The deed also provided for the payment to Anna Horst, wife of Abraham Horst, in consideration of her uniting in said deed, of the one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. The grantees in this deed accepted the trust, and proceeded to sell all the property as therein provided. In the distribution of the proceeds of the real estate, it was HELD:

- 1st. That the grantees in the deed were bound by the stipulation and agreement contained therein, in favor of the wife, and the mortgage to them should be subjected to the allowance to her of the one-twelfth as provided by said deed.
- 2nd. That the claim of Mary W. Miller, she not having been a party to the deed of trust, should not be subjected to the charge upon the proceeds of the real estate, in favor of Mrs. Horst.

Where property conveyed to trustees for the benefit of creditors has been sold, a judgment creditor who files her claim to obtain her proportion in a just distribution of the proceeds among the *bona fide* creditors, does not thereby become bound to assent to the payment of every charge made by the deed upon the property conveyed, whether just or unjust.



Reiff, *et al.* vs. Eshleman. Reiff, *et al.* vs. Horst.

APPEALS from the Circuit Court for Washington County, in Equity.

Abraham Horst, a citizen of Washington County, being indebted to Daniel Eshleman, a citizen of Pennsylvania, executed to him on the 5th of June, 1874, a mortgage of certain real estate lying in Washington County, to secure the sum of \$4000, with interest thereon from the 1st of April, 1874. The mortgage was duly acknowledged before a justice of the peace in and for Washington County, on the day of its date. The following was the affidavit of consideration by the mortgagee:

"State of Pennsylvania, Lancaster County, to wit: Personally appeared before me, a justice of the peace in and for said County and State, Daniel Eshleman, mortgagee, and made affirmation in due form of law, that the consideration mentioned in the foregoing mortgage, is true and *bona fide* as therein set forth.

DANIEL ESHLEMAN.

" Affirmed and subscribed before me, June 8th, 1874.  
A. B. REIDENBACH, J. P."

The foregoing mortgage was filed for record in the office of the clerk of the Circuit Court for Washington County, on the 12th of June, 1874. Subsequently to the date of said mortgage Abraham Horst and Anna his wife, executed several mortgages upon the same real estate, each of which contained the required affidavit of consideration, and was duly executed, acknowledged and recorded: One was to Daniel Cearfoss, John Horst and Israel Reiff, dated the 17th of December, 1875, to secure them as endorsers on certain promissory notes. Afterwards, on the 10th of July, 1876, the said Abraham and Anna his wife, united in a deed of trust of all his property, real and personal, to the said Israel Reiff, Daniel Cearfoss and John Horst, with authority to them to sell

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Reiff, *et al. vs. Eshleman.* Reiff, *et al. vs. Horst.*

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and dispose of the same, and collect all debts due to the said Abraham, and apply the proceeds thereof, first, to the payment of the costs and expenses of the said deed, and the execution of the trust thereby created; secondly, to certain commissions to said trustees, and the balance to all liens and incumbrances upon the property thereby conveyed, according to their priority under the law, and with any balance that might remain after payment of such liens, to pay, so far forth as the same might reach, all the just debts due and owing by the said Abraham, without preference or priority, &c. The deed also provided for the payment to the said Anna Horst, in consideration of her uniting in said deed, of the one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. Part of the real estate conveyed by said deed, which was duly acknowledged and recorded, was the same real estate conveyed by the aforesaid mortgages.

The trustees took possession of the property conveyed to them under said deed of trust, and sold the same; the sales of the real estate were duly reported to and ratified by the Circuit Court, and the proceeds thereof distributed by the auditor in his account marked No. 2. In said account the auditor first allowed out of the proceeds of the sales of all said real estate, the trustees' commissions and expenses, taxes, costs, &c., and the sum reserved in said deed to Anna Horst, in lieu of her contingent right of dower, proportionably, and then distributed the net balance of the proceeds of the real estate included in said mortgagees after first discharging prior liens thereon, to the said mortgage of Cearfoss, Reiff and Horst, to the exclusion of the mortgage of Daniel Eshleman, upon the ground as stated in his report, of its defective execution, "there being no such affidavit of consideration endorsed thereon as required by the Code." To such distribution by the auditor of said net balance, and to the non-allow-

Reiff, *et al. vs. Eshleman.* Reiff, *et al. vs. Horst.*

ance of his said mortgage, Daniel Eshleman filed exceptions. Exceptions were likewise filed by Mary W. Miller, a judgment creditor of Abraham Horst, to whom was awarded by the auditor a distribution on said judgment out of the proceeds of the sales of the said trust estates, and by Daniel Cearfoss, John Horst and Israel Reiff as joint mortgagees, and by the said Horst and Reiff as individual mortgagees of Abraham and Anna Horst, to the allowance by the auditor in said account No. 2, to Anna Horst, the wife of the said Abraham Horst, of the sum of \$1581.35, awarded, as the amount reserved in the deed of trust, in lieu of her contingent right of dower.

On the 8th of October, 1878, the Court (MOTTER, J.,) passed an order sustaining the exceptions of Eshleman and remanding the papers in the cause to the auditor, that a new account should be stated, allowing the exceptant's mortgage, and giving it priority over the mortgage of the said Cearfoss, Reiff and Horst. On the same day, the Court also passed an order, overruling the exceptions of Mary W. Miller and Cearfoss, Horst and Reiff and awarding the costs of said exceptions to Mrs. Horst. The auditor re-stated account No. 2, in accordance with the order of the Court on the exceptions of Daniel Eshleman.

On the 16th of November, 1878, the Court passed an order finally ratifying the auditor's account No. 2 re-stated. From this order and from the previous orders of the 8th of October, 1878, Israel Reiff, John Horst and Mary W. Miller appealed. The administrators of Daniel Cearfoss who died after the decision, declined to join in the appeals.

The cause was argued before BARTOL, C. J., BRENT, MILLER, and ALVEY J.

*William M. McDowell* and *H. H. Keedy*, for the appellants.

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Reiff, *et al.* vs. Eshleman. Reiff, *et al.* vs. Horst.

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*Albert Small*, for Daniel Eshleman.

*Tryon Hughes Edwards*, for Mrs. Anna Horst.

BRENT, J., delivered the opinion of the Court.

There are two appeals contained in the same record. They have been argued together, and we shall dispose of them in one opinion.

In the appeal of Reiff and others against Daniel Eshleman, the question involved is the priority of their respective mortgages.

The mortgage of Daniel Eshleman is the first in date, but it is objected, that although it has been put upon the records in time, it is void, because there is no proper affidavit by the mortgagee, appended to it, of the *bona fides* of the consideration expressed in it.

By referring to the mortgage, it is very apparent that this objection is well founded. There is attached to it what purports to be a certificate that an affidavit was made in the State of Pennsylvania before a person styling himself a justice of the peace of that State. It is signed "A. B. Reidenbach, J. P." but is without any other authentication.

In this form the certificate can have no weight, and the mortgage must be considered as one without an affidavit endorsed upon it.

The 29th section of Article 24 of the Code provides that, "No mortgage shall be valid, except as between the parties thereto, unless there be endorsed thereon an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bona fide* as therein set forth; this affidavit may be made, at any time before the mortgage is recorded, before any one authorized to take the acknowledgment of a mortgage, and the affidavit shall be recorded with the mortgage."

As the question has been argued, it may be said, that the right of a mortgagee to make the required affidavit

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Reiff, *et al.* vs. Eshleman. Reiff, *et al.* vs. Horst.

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before a *justice of the peace* of another State is not presented in this case, and we do not wish to be understood as intimating an opinion upon it.

Under the section of the Code just cited, we think it clear, that an endorsement of the required oath upon a mortgage before it is recorded is essential to its validity. The Act not only requires the affidavit, but in equally mandatory terms requires it to be *endorsed* on the mortgage and *recorded* with it. The fact that the oath was taken is not the subject of parol proof. It can only be established by the mode mentioned in the law, that is, by a formal endorsement upon the mortgage.

The mortgage of Eshleman being in this respect imperfect and defectively executed, cannot be aided in any respect by being placed upon the records. The registration of it, like that of a deed defectively acknowledged, does not operate as constructive notice.

But it is argued on the part of the appellee that the appellants at the time of the execution of their mortgage had actual notice of this mortgage. If so, it is conceded in the brief filed on the part of the appellants that such notice establishes its priority. And this is in accordance with the decisions in this State.

Upon this branch of the case we think the proof quite sufficient to establish actual notice. The testimony of Mr. Small is very conclusive and satisfactory. His position as a member of the bar, and as the attorney who prepared the mortgage of the appellants, enables him to speak with accuracy and certainty upon this matter. The details of his testimony preclude any presumption that he has erred, and he expressly states, that in informing the appellants of the incumbrances upon the land, proposed to be mortgaged to them, he included the mortgage of Daniel Eshleman.

We have seen no circumstance to impair the weight of this proof, and upon the ground that there was actual

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Reiff, *et al.* vs. Eshleman. Reiff, *et al.* vs. Horst.

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notice of the incumbrance of the appellee, we shall affirm the ruling of the Court below sustaining the exceptions of Eshleman to the auditor's account, and its order ratifying account No. 2, re-stated in accordance with such ruling.

The next appeal is that of Israel Reiff, John Horst and Mary W. Miller, against Anna Horst.

The appellants, Reiff and Horst, were mortgage creditors of Abraham Horst, and Mary W. Miller was a judgment creditor.

Anna Horst, the appellee, had united with her husband in the mortgage to Daniel Cearfoss, John Horst and Israel Reiff, and in mortgages to other parties.

Abraham Horst becoming involved, executed on the tenth day of July, 1876, a deed of trust, in which his wife, Anna Horst, joined, of all his property of every description to Daniel Cearfoss, John Horst and Israel Reiff, stipulating for its sale, and for the payment, first, of all liens and incumbrances according to their priority, and secondly, of all the other debts of Abraham Horst, without any preference or priority among them.

The deed also contains the following clause: "And whereas, the said Anna Horst, wife of the said Abraham Horst, hath a contingent right of dower in the lands conveyed by this deed, it is expressly agreed and understood, that her joining in the execution hereof is upon the condition and in consideration of the payment to her out of the last moneys that shall be derived from the sales of the real estates, of the one-twelfth of the gross proceeds thereof."

The parties named as grantees in this deed accepted the trust and proceeded to sell all the property as therein provided.

In the distribution of the proceeds of the real estate, the Court below directed an allowance to the appellee of one-twelfth part of the gross proceeds, and ratified account No. 2 re-stated, in which the allowance is made.

From this order this second appeal is taken.

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Reiff, *et al.* vs. Eshleman.    Reiff, *et al.* vs. Horst.

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As Reiff, Horst, and Mary W. Miller are the only parties appealing, it is alone with their cases that we have to deal.

It is apparent from the facts in this case, that the contingent right of dower of Mrs. Anna Horst in the lands mentioned in this last deed is very small. She had united with her husband in mortgages to very nearly the value of the lands mortgaged, and the one-twelfth part, now attempted to be secured to her, is largely in excess of any amount to which she would be entitled as dower, if she had not united in the deed of the 10th of July, 1876.

And the question presented by this appeal, is whether or not these appellants are bound by the reservation in her favor contained in that deed?

To hold that a wife by joining in a deed like the present, could secure to herself more than the value of her dower, would be opening a wide door to abuse if not to fraud. We have been referred to no case in which it has been allowed, and know of no principle of law which would justify it where the rights of creditors, generally, are involved.

Are the appellants in a situation to urge this objection, becomes an important consideration. We do not think that Horst and Reiff can do so. They were mortgagees holding a mortgage to which Anna Horst, the appellee, was a party with her husband—and they are the grantees in the deed of 1876. Whether they advised and counseled the execution of this deed is unimportant. They became parties to it, and accepted it with the conditions imposed. Instead of proceeding under their mortgage, they elected to accept the deed of trust, and proceed under it to realize their debt. In so doing, being parties grantees, they became bound by the stipulations and agreements upon which it was executed.

So far, therefore, as they are concerned, the ruling of the Court below, in directing their mortgage to be sub-

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Reiff, *et al. vs. Eshleman.* Reiff, *et al. vs. Horst.*

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jected to the allowance of the one-twelfth to Mrs. Horst under the deed of trust, will be affirmed.

The claim of Mrs. Miller stands upon a different ground. She is not a party to this deed of trust. After the property had been sold, she filed her claim as a judgment creditor to obtain her proportion in a just distribution among the *bona fide* creditors. By so doing, she does not become bound to assent to the payment of every charge made by the deed upon the property conveyed, whether just or unjust.

If this deed provides for the payment of an unjust and improper charge upon the property, a creditor may resist the payment of such charge upon the same principle, that he may resist the payment of a fraudulent debt, to which priority is given by the conveyance. That the latter can be done, is the recognized law of this State. *Mackintosh vs. Corner*, 33 Md., 606.

There is no reasonable distinction between the two, so far as any right can exist to have the one or the other paid out of property conveyed for the benefit of creditors.

We do not think under all the facts and circumstances of this case, that the creditors of Abraham Horst, who are not parties to the deed, can be held bound by the charge upon the proceeds of the sale of the real estate in favor of Mrs. Horst.

So far, therefore, as Mary W. Miller, one of the appellants, is interested, the order of the Court, subjecting her claim to this charge, will be reversed. The case will be remanded, that the account, which has been ratified, may be reformed and re-stated in this respect.

Equity and good conscience will however require, that Mrs. Horst should be allowed, under the Chancery rule, an amount equal to what she would have received for her dower had she not joined in the deed of the 10th of July, 1876. It is apparent that she never designed to abandon any claim she might have had for dower by executing



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Estep and Shaw vs. Mackey, et al.

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this deed. She will only be held to have assented to its sale, and will be compensated in a just allowance and proper proportion of the purchase money.

*In the appeal of Israel Reiff, and others vs. David Eshleman, the orders are affirmed with costs.*

*In the appeal of Israel Reiff, and others vs. Anna Horst, the orders are affirmed in part, and reversed in part, with costs to be equally paid by Israel Reiff and John Horst, appellants, and Anna Horst, appellee, and the cases remanded.*

(Decided 17th July, 1879.)

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JOHN C. ESTEP and MARGARET P. SHAW vs. WILLIAM D. MACKEY, ELLA C. SHAW, and others.

*Art. 5, sec. 29, of the Code as affecting a question of Jurisdiction, on Appeal—Construction of Will made before the Act of 1862, ch. 161—Executory devise—A limitation over, after a Devise to Illegitimate children, on their Dying without heirs, held to be void.*

Art. 5, sec. 29, of the Code, precludes this Court from entertaining the question as to the sufficiency of the averments of the bill to give the Court jurisdiction, where the record does not show that the question was raised in the Court below.

The will of a testator contained the following clause: "Item second, I give and bequeath to my following named illegitimate sons by M. E. C. as follows: to H. C. C., A. C., and J. C., all my real and personal property to be equally divided among them, after reserving property enough to rent or hire yearly for the sum of one hundred and fifty dollars, for the support of M. E. C. during her life-time, or so long as she lives a life of a virtuous woman, and all my just debts are paid. I also make this provision in my will, that in case one or more, or all of the above named children should die before

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Estep and Shaw *vs.* Mackey, *et al.*

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deceased shall arrive at the age of maturity, or after they have arrived at the age of maturity, and die without issue or lawful heirs, the property, both real and personal, belonging to the deceased one, to be equally divided among the other two surviving children; and in case that one more should die before he arrived of age, or without issue or lawful heirs, the surviving child to have all of the two deceased ones property, both real and personal; and I furthermore provide, that if all the children named in this will shall die without heirs, then the property contained in this will, I devise and bequeath to the heirs of John C. Estep, and the heirs of Margaret P. Shaw, to be equally divided among them, share and share alike." The will was dated the 6th day of August, 1861, and was admitted to probate on the 13th day of April, 1864. **HELD:**

- 1st. That the will must be construed without the help of the Act of 1862, ch. 161. The terms and expressions used in it must be understood in the sense which long usage and the decision of Courts had attached to them; and they could not be understood in a different sense which a statute had ascribed to them since the will was made.
- 2nd. That H. C. C., an illegitimate son of the testator who was alive at the time the will was made, having afterwards died, and another illegitimate son of the same name having been afterwards born, the latter could not claim directly under the will by virtue of the devise therein to H. C. C.
- 3rd. That the words used by the testator showed his intention to give each of his sons named in the will a fee, defeasible in *some* contingency; and the limitation over upon the happening of the contingency, was only good, if at all, as an executory devise.
- 4th. That the provisions of the Act of 1825, ch. 156, having changed the status of illegitimate children as to inheritable blood, "dying without issue," can no longer be restricted in their case to dying without heirs of the body, but must be construed when used respecting them precisely as if used with reference to persons born in wedlock.
- 5th. That the words "die without issue" or "without heirs," must be regarded as used in this will in their technical sense, there being no other words used to qualify their meaning.
- 6th. That the contingency upon which the limitation over was made to depend being an indefinite failure of heirs, the devise over was void, and the estate of the first taker became absolute.

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Estep and Shaw *vs.* Mackey, *et al.*

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7th. That H. C. C. was entitled to the real estate, he being the son of the testator and of the said M. E. C., and only heir-at-law of the survivor of the three devisees, his brothers.

APPEAL from the Circuit Court for Prince George's County, in Equity.

By the will of Joshua T. Estep, dated the 6th day of August, 1861, the testator gave his property, real and personal, to Henry Clay Cross, Arthur Cross, and Julian Cross, his illegitimate children by Mary Emily Cross, to be equally divided among them; and in the event of their dying without heirs, he gave the same to the heirs of John C. Estep and the heirs of Margaret P. Shaw, to be equally divided among them, share and share alike. The terms of the will are stated in the opinion of the Court.

Henry Clay Cross died without issue in the life-time of the testator, and another son of the testator by said Mary Emily Cross was afterwards born, who was also named Henry Clay Cross. Arthur Cross and Julian Cross having also died without issue, the bill in this case was filed by John C. Estep and Margaret P. Shaw, against the children of the former, and the child and grand-children of the latter, together with the husband of her deceased child, alleging that they were the brother and sister of the testator and his only heirs at law, and as such were entitled to certain real estate of which the testator died seized, and asking a construction of the said will. Henry Clay Cross the second, was made a defendant by an amended bill, and claimed that he was entitled to the property as the heir of his deceased brothers.

The Court below (MAGRUDER, J.,) passed a decree dismissing the bill, and the complainants appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER and IRVING, J.

*I. Parker Veazey*, for the appellant, Mrs. Margaret P. Shaw.

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*Estep and Shaw vs. Mackey, et al.*

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*Richard B. B. Chew*, for the appellant, John C. Estep.

*Frank H. Stockett*, for the appellee, Henry Clay Cross.

IRVING, J., delivered the opinion of the Court.

This appeal brings up for our construction the will of Joshua T. Estep, which was dated the 6th day of August, 1861, and which was admitted to probate on the 13th day of April, 1864. That part of the will, which we are called upon to interpret, reads as follows: "Item 2nd, I give and bequeath to my following named illegitimate sons by Mary Emily Cross, as follows: to Henry Clay Cross, Arthur Cross and Julian Cross, all my real and personal property, to be equally divided among them, after reserving property enough to rent or hire yearly for the sum of one hundred and fifty dollars, for the support of Mary Emily Cross during her life-time, or so long as she lives a life of a virtuous woman, and all my just debts are paid. I also make this provision in my will, that in case one, or more, or all of the above named children should die before deceased shall arrive at the age of maturity, or after they have arrived at the age of maturity, and die without issue or lawful heirs, the property, both real and personal, belonging to the deceased one to be equally divided among the other two surviving children; and in case that one more should die before he arrived of age, or without issue or lawful heirs, the surviving child to have all of the two deceased ones property, both real and personal; and I furthermore provide, that if all of the children named in this will should die without heirs, then the property contained in this will I devise and bequeath to the heirs of John C. Estep, and the heirs of Margaret P. Shaw, to be equally divided among them, share and share alike." The next and last clause of the will appoints an executor and a guardian for his said children.

It is not necessary for us to consider the question, raised in argument, whether the averments of the bill are suffi-

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Estep and Shaw *vs.* Mackey, *et al.*

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cient to give the Court below jurisdiction of the case. The record does not show that any such question was raised in the Circuit Court, so that "we are precluded" from entertaining that question "by the very stringent language of section 27, Art. 5, of the Code," and by several decisions of this Court thereon. *Gough vs. Manning*, 26 *Md.*, and *Ashton vs. Ashton*, 35 *Md.*, 502.

The will before us must be construed without the help of the Act of 1862, ch. 161, which has been invoked in its aid by the appellants. The case of *Magruder & Tuck, Ex'rs vs. Carroll*, 4 *Md.*, 335, so strongly relied on by counsel to establish the right to construe this will by the provisions of that Act, which was passed after the will was made, so far from sustaining that proposition, is adverse to it. In that case the Court was considering the effect of the Act of 1849, ch. 229, on wills made before its passage, and the Court puts its decision expressly upon the presence of the second section in the Act, which provided for its retroactive effect upon wills made before its passage, where the makers thereof should not die before the first day of June, 1850. In the opinion, Judge LEGRAND says, "if the Act were constituted of the first section, we would not experience any difficulty in deciding that it was intended, and did in fact operate only on wills executed after the first day of June, 1850." In *Johns vs. Hodges*, 33 *Md.*, 521, the same question was before the Court, after the Code had been adopted, wherein the second section of the Act of 1849 was omitted; and the Court decided, that with the repeal of the second section, which the Code had effected, by its omission, its retroactive effect was destroyed and it must be held to operate only on wills made subsequent to it. The Court there says "the will, having been executed before it, is beyond its reach, and must be governed by the law as it existed when it was made." The reason for such a decision is substantial. The testator is presumed to know the law as it exists, and to have made

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Estep and Shaw *vs.* Mackey, *et al.*

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his will, and used language in making it, with due regard and reference to the existing law. The terms and expressions used in this will, therefore, must be understood in the sense which long usage and the decision of Courts had attached to them; and they cannot be understood in a different sense which a statute has ascribed to them since the will was made. The appellants in this case are brother and sister of the testator, and claim by their bill that by the will he gave the first takers only a life estate; that the limitation over to the heirs of the complainants is void, because of the established rule that "*nemo est hæres viventis*;" and that the limitation over failing, he has died intestate of the fee, and they as his heirs-at-law are entitled. The only party defendant making defence is Henry Clay Cross, who defends upon two grounds, viz: first, that a fee was given to the devisees, his three brothers, and he is the heir-at-law of the survivor of them; and, secondly, that if that be not so, he by name fills the description of the devisee, Henry Clay Cross, named in the will, and takes accordingly. It is both conceded and proved that a son, called Henry Clay Cross, was living when the will was made, and who was clearly intended, and died in the life-time of the testator and before this appellee was born. So that notwithstanding he bears the same name, and is a son of the testator, as was the other, the fact that he was born after the will was made, and after the death of the other Henry Clay Cross, his brother, resolves the ambiguity, supposed to exist, adversely to his claim directly under the will. He was not in being and could not have been intended. If he has any right to the property mentioned in the will, it must be by virtue of being the heir at law of a brother or brothers, who took an inheritable estate under the will. We come then to the main question, what estate the three sons of the testator took under this will; and whether there has been any effectual limitation over of the estate devised to them. To

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Estep and Shaw *vs.* Mackey, *et al.*

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ascertain the intent of the testator, from an examination of the whole will, and careful comparison of all its provisions, and to give effect to that intention, as far as is consistent with the established rules of interpretation and law, is our duty.

The intent, however, must clearly appear from the language used in the various parts of the will; and unless the intent is clearly and certainly different from that which the technical language he has used may import, we must adhere to their technical signification, and give effect to the will accordingly. The first object the testator, in this case, had in view, was suitable provision for his three sons named in the will. The general intent manifestly was to give his estate to them, in equal proportions, and the issue of each was to succeed to the father's estate. If either died "without issue or lawful heirs," the survivors or survivor, as the case might be, was to take the whole. In this expression, "that in case one or more, or *all* of the above named children should die before deceased should arrive at maturity, or after they have arrived at the age of maturity," and die "without issue or lawful heirs, the property both real and personal, belonging to the deceased one to be equally divided among the other two surviving children," the word *all*, on which so much stress has been laid in argument, can mean nothing more than the word "any." In the connection in which it is used, and with reference to the provision which the testator was then making, the testator has bunglingly said that he means the qualification he is imposing to apply to every one of them, as respects the devolution of the estate on the survivors in the contingency named. It is very certain from the language used what object the testator had in view. He intended to give more than a bare life estate. If the word issue meant children *only* in that connection, he would not have added, by way of more clearly defining his

meaning the words "or lawful heirs." If by the terms "issue or lawful heirs," the testator meant "heirs of the body," and intended so to confine the devise, the language would have created an estate tail general, which the statute would convert into a fee. The testator, then, as we read the will, gave each of his sons a fee defeasible in *some* contingency, and whether that contingency has been declared with such precision and distinctness as to enable us with absolute certainty to carry out what was in the testator's mind is very doubtful. We may not guess what he intended, but in the absence of the clearest expression of intent in the will, it must receive just such interpretation as the language used legally imports. In the sentence by which the estate is given to the sons, no words of perpetuity are used, but in the next sentence words are used which, *without* the aid of the Act of 1825, might be held as giving by necessary implication a larger estate than a life estate; and under the operation of the Act of 1825, which is section 305 of Art. 93 of the Code, there can remain no doubt that the sons took a fee; for there are no words, in the will, which indicate that the testator intended to give only a life estate. The limitation over, whether effectual or ineffectual, to carry out the testator's purpose, creates no doubt as to the testator's design to give them either an estate in fee, defeasible on the contingency named happening, or an estate tail general, with a limitation over; and it would make no difference which, for the Act of Assembly converts the estate tail into a fee, and the limitation over in either case is only good, if at all, as an executory devise. Prior to the Act of 1825, ch. 156, which gives to the Code, section 30 of Article 47, a limitation over in the event of an illegitimate devisee "dying without heirs" was held to import not an indefinite failure of heirs, but a failure of heirs of his body at death; because, the Court said, *he* could have no other heirs; and the testator could only have intended such



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Estep and Shaw vs. Mackey, *et al.*

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heirs as the law allowed the person to have. *Pratt vs. Flamer*, 5 H. & J., 10. Since that decision, the statute has made them capable of inheriting from each other, and the descendants of each other, and from their mother; and by a statute still later (and since this will was made) the mother and her heirs-at-law are made their possible heirs. The provisions of the Act of 1825 having changed their status as respects inheritable blood, "dying without heirs" can no longer be restricted in their case to dying without heirs of the body, but must be construed, when used respecting them, precisely as if used with reference to persons born in wedlock.

Dying "without issue" or "without heirs," by a long list of cases in this State, beginning with *Davidge vs. Chaney*, 4 H. & McH., 393, and ending with *James vs. Rowland*, page 462 of this volume, when applied to real estate, have uniformly been held to mean an indefinite failure of issue or heirs, unless there were other words or provisions in the will which enabled the Court to see with reasonable certainty that the testator did not so mean. The absence of such language to qualify that expression, so that we can limit it, without doubt as to what the testator meant, compels us to give these words in this will their technical signification. When the testator was making a limitation over as between the children (his devisees) to the survivor of them in the contingency named, he uses terms which may very naturally be understood, under the circumstances, to mean heirs of the body; but when he comes to make a limitation over to collaterals, when the last of the sons should die, he uses very different language to designate the contingency he had in his mind. He does not say now "without issue or lawful heirs," but "without heirs," which in legal contemplation means a very different thing; and it is to be observed that in designating the contingency he intended to provide for, and in describing the contingent devisees he used the same term "heirs,"

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Estep and Shaw *vs.* Mackey, *et al.*

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which by all authority means heirs general, unless there be something in the context to control it and restrict it. We can find nothing in the context to justify us in departing from the ordinary meaning which is given it. If there were anything in the will (the slightest expression) to show that the testator in that will recognized his brother and sister as then living, then with some reason the word "heirs," in the description of the persons he intended to take in the event he was providing for, might be held to mean *children*, and as indicating that the testator intended to exclude from his bounty his brother and sister in favor of their children. And having by that means obtained a meaning for the word "heirs" there, it might be held as used in the same sense in that part of the sentence which names the contingency upon which his brothers and sisters were to take. There is no such expression in this will to help us to a different meaning from that which the words legally import.

The contingency, upon which the limitation over is made to depend, being an indefinite failure of heirs, the devise over is void. This being so, the estate of the first takers becomes absolute; and the appellee, Henry Clay Cross, being admitted to be the son of the testator and the said Mary Emily Cross, and only heir-at-law of the survivor of the three devisees, his brothers, is entitled to the real estate. The decree of the Circuit Court for Prince George's County, dismissing the bill, will be affirmed.

*Decree affirmed, with costs.*

(Decided 14th November, 1879.)

DAVID EVANS vs. ELIZABETH HORAN and ELIZA  
PRESTON.

*When a Land Record Book may be removed from the County of its origin to be used as Evidence in the Court of another County—Certificate of Acknowledgment of a Deed—Voidable deed—How a Deed of Bargain and Sale, where the Grantor was non compos at the time of its Execution, may be avoided.*

As a general rule Land Record Books cannot be removed from the county of their origin, to be used as evidence in the Courts of other counties, but in one peculiar case they may be used in order to prevent wrong and injustice.

Thus where the question of the execution *vel non* of a deed by a marksman, is legitimately raised, and the original is lost or not produced by him who claims under it, and the certified copy which he offers shows the mark was duly made, the other side may rebut this by the production of the Record Book itself.

The certificate of acknowledgment is not conclusive of the fact that a deed was actually signed and sealed by the grantor; the execution of a deed consists of acts of the party making the deed and who is affected by it.

A deed of bargain and sale of real estate for a valuable consideration, duly acknowledged and recorded, is voidable only, and not absolutely void, by reason of the fact that the grantor was *non compos mentis* at the time it was executed.

Such a deed may be avoided by the heirs-at-law of the grantor; but they cannot do this at law in an action of ejectment, where possession under it has been held for a long period, and permanent improvements have been made upon the land by a *bona fide* possessor; they must assail it by a direct proceeding in equity, where the equities of the parties can be properly adjusted.

APPEAL from the Circuit Court for Garrett County.

This was an action of ejectment brought by the appellees against the appellant and Sarah Evans, his wife.

Pending the case, Sarah Evans died ; her death was suggested, and her name as a defendant was stricken out.

*First and Second Exceptions.*—Sufficiently set out in the opinion of the Court.

*Third Exception.*—The plaintiffs offered the following prayers :

1. If the jury shall believe from the evidence, that William Barnes died, seized and possessed of the land mentioned in the plaintiffs' declaration, and by his last will and testament devised the same to his daughter, Ruth Metz, for life, and at her death, to her son, John Metz ; and that the said John died intestate, and without issue ; and that the said John Metz did not, during his life-time, sign and make the deed of conveyance offered in evidence in this case ; or if they do believe that he did sign, execute and acknowledge said deed, but at the time of so doing, had not sufficient mental capacity to make a valid deed or contract, and that the said Ruth Metz departed this life in the year 1863, and that the plaintiffs in this cause are the sisters of said John Metz, then the plaintiffs are entitled to recover in this suit to the extent of their interest or estate therein, at the time of the bringing of this suit.

2. That the defendant cannot make title to the land mentioned in the plaintiffs' declaration, by possession thereof, if they find that the land was devised by William Barnes to Ruth Metz for life, and at her death to John Metz, and that said Ruth died in 1863.

3. That unless the jury shall believe from the evidence that John Metz signed the paper-writing offered in evidence by the defendant, purporting to be the deed from Isaac Metz, Ruth Metz and John Metz, to one James Morrison, Junior, dated the 4th day of December, 1821, offered in evidence, that then the said paper-writing is not the deed of John Metz, and passed no title out of the said John Metz to James Morrison, Junior, and that neither

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Evans vs. Horan and Preston.

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the defendant nor any one else can claim title to the land mentioned in the said writing, by virtue of the said writing.

4. That if the jury shall believe from the evidence that John Metz did sign, seal and acknowledge, with Isaac and Ruth Metz, the paper-writing offered in evidence by the defendant, purporting to be a deed of conveyance of the land mentioned in the plaintiffs' declaration, to one James Morrison, Junior; and if they shall further believe from the evidence that the said John Metz, at the time of the signing, sealing and acknowledging the said writing, was of weak and unsound mind, and by reason of his weakness and unsoundness of mind, was incompetent to make a valid deed of conveyance of his land or any interest therein, that then the said paper-writing conveyed no title from said John Metz, and that the said defendant, nor any one else, can claim any title to the land mentioned in the plaintiffs' declaration, under and by virtue of said deed or paper-writing.

And the defendant offered the three following prayers:

1. If the jury believe that John Metz was not insane, not idiotic, but was a man only of weak mind, and of sufficient capacity to make a valid contract, then, before they can find against the deed offered in evidence (purporting to be executed by him) upon that ground, they must further find that such weakness of mind was taken advantage of by the party or parties who procured said deed from him.

2. That under the evidence in this cause, the plaintiff cannot recover to a greater extent than two-eighths and two-sevenths of one-eighth.

3. That the copy of the alleged deed from John Metz, and others, to James Morrison, Jr., offered in evidence, is *prima facie* evidence of the execution of said deed, and the burden of proof is on the plaintiffs to show that it was not executed by said Metz, and also to show the mental incompetency of said Metz to execute the same.

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Evans vs. Horan and Preston.

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The Court, (PEARRE, J.,) granted the plaintiffs' prayers, and the defendant's second and third prayers as offered, and modified the defendant's first prayer by inserting the word "only" after the word "man," and the words "and of sufficient capacity to make a valid contract," after the words "weak mind." The defendant excepted.

The jury found a verdict for the plaintiffs to the extent of two-eighths, and two-sevenths of one-eighth of the land claimed in the declaration, and judgment was entered accordingly. The defendant appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER, ALVEY, and IRVING, J.

*William Brace*, for the appellant.

*James E. Ellegood*, for the appellees.

MILLER, J., delivered the opinion of the Court.

This is an action of ejectment involving the title to two tracts of land in Garrett County, containing about eighty four acres. It was admitted that the title to these tracts was, in 1803, vested in William Barnes by a deed from the patentee, and that Barnes by his will devised the same to his daughter Ruth Metz for life, with remainder in fee to her son John Metz. The life tenant, Ruth Metz, died in 1863, and John Metz died in 1857 or 1858, unmarried and without issue, leaving eight brothers and sisters, his heirs-at-law, and the plaintiffs are two of his sisters. Upon this proof the plaintiffs rested their case. The defendant then offered in evidence a duly certified copy of a deed purporting to have been executed by Ruth Metz and her husband, Isaac Metz, and by her son, the said John Metz, bearing date December 4th, 1821. By this deed the land in question was conveyed to James Morrison in consideration of the sum of \$400, and the

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Evans vs. Horan and Preston.

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defendant claimed title by *mesne* conveyances from Morrison. The plaintiffs then called a deputy clerk of the Circuit Court for Allegany County, who had been summoned to bring with him the Land Record Book of that county containing the record of this deed of 1821, and proposed to have the book identified by the witness, and to offer in evidence to the jury the original record of this deed, in order to show (as they claimed said record would show,) that the copy of the deed offered in evidence by the defendant was not a *true copy*, in that, as plaintiffs claimed, the original record contained *no mark* to the name of John Metz, though the same contained the words "his mark," for the purpose of showing that the same was never executed by John Metz. The defendant objected to this record being offered in evidence, but the Court overruled the objection and allowed the record to be offered to the jury. To this ruling the defendant excepted, and this is the first question presented for review.

The objection mainly urged against the correctness of this ruling is, that the Land Record Book produced and offered in evidence, constituted part of the original records of another county. The argument is, that in no case can such records be removed from the county of their origin, and the custody of the proper officials there, for the purpose of being used as evidence in the Courts of other counties. It is said the law (Code, Art. 37, sec. 58,) has provided, that exemplified copies of such records shall be evidence, and reference is made to the cases of *Jones vs. Jones*, 45 Md., 154, and *Goldsmith vs. Kilbourn*, 46 Md., 292, where it was held, that original papers in a cause ought not to be taken from the files of another Court, and produced as evidence instead of copies or exemplifications, as provided for by the Code, and that such original papers can only be used in the Court to which they belong. The propriety of this general rule cannot be questioned, and it applies as well to Land Record Books, as to judg-

ments, decrees or other judicial proceedings. No description of records are more important than those of conveyances of real estate, and in none are the public more deeply interested. A rule or principle of evidence therefore which looks to the preservation of such records, and promotes their security and safety by preventing their removal from place to place, at the instance and for the use of litigants in other counties, should be carefully observed and firmly upheld by the Courts. But while this is so, circumstances may occur when use must be made of the original records in order to prevent wrong and injustice. Such in our opinion are the circumstances of this case, and the Court below, therefore, properly allowed a departure from the general rule. The execution by John Metz of the deed of 1821, was a vital point to the defendant's case. The original document which would have thrown light upon this question was not produced, and the trial took place nearly fifty-eight years after the date of that instrument. There was no proof that it was in existence or had been preserved by any one. It could not be presumed to have ever been in the possession of the plaintiffs. On the contrary, if presumption is to be indulged in, in the absence of all proof on the subject, that presumption would place it in the hands of the defendant, for he claimed under it, and it was a muniment of his title. In support of his title the defendant produced, as he had the right to do, an exemplified copy of this deed. That copy indicated, that John Metz had executed the original instrument by making his mark in the proper place. But the plaintiffs insisted that the record from which this copy was taken contained no such indication, and nothing purporting to be such a mark, and therefore, the copy offered in evidence by the defendant was not in fact a true copy of that record. That it was permissible for the plaintiffs to show, that the deed was never in fact executed by their brother cannot be a matter of dispute.



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Evans vs. Horan and Preston.

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The law is imperative that "every deed conveying real estate shall be signed and sealed by the grantor." Code, Art. 24, sec. 10. The certificate of acknowledgment is not *conclusive* of the fact of such signing or execution. The execution of a deed consists of *acts* of the party making the deed, and who is affected by it. *Carrico vs. Farmers' and Merchants' National Bank*, 33 Md., 245. When this signing or execution is to be made by a party who cannot write or sign his name, the usual mode of procedure is well understood. He makes his mark in the space left for that purpose either with the pen in his own hand, or by holding or touching it when made by another by his direction and assent. The mark so made appears on the original instrument, and is recorded with and as an essential part of it, just as is the signature of one who has written his name in full, and the absence of the appropriate mark on the Record Book is certainly some evidence at least, that the original was never executed as the law requires. Strength would be added to such evidence if, as in the present case where the deed purports to have been executed in the same manner by three parties, the marks of one or two should appear on the record, and none of the third. We hold, therefore, that when the question of the execution *vel non* of a deed by a marksman is legitimately raised, and the original instrument is lost, or not produced by him who claims under it, and where the exemplified copy which he offers, shows that the mark was duly made, it is competent for the other side to rebut this by the production of the Record Book itself. The very necessity of the case creates an exception to the general rule. It is hardly possible to conceive of any other circumstances in which an exemplified copy of a deed would not serve all the purposes of the original record as well as all the ends of justice, and that instances of this character are most rare and exceptional is manifest from the fact, that during the long time

that has elapsed since the passage of our Registry laws, this is the first and only case in our judicial annals wherein such a difficulty has arisen, or such a question been presented. We have, therefore, no fear that in affirming, as we do, this ruling of the Circuit Court, we shall introduce an exception to the salutary general rule, which will inconvenience the public or endanger the preservation and safety of the Land Records of the State.

There being no error in the admission of this testimony, it follows that the Court was right in giving instructions to the effect that the defendant could not claim title under the deed of 1821, unless the jury found from the evidence that that deed was signed or executed by John Metz. These instructions at the instance of the plaintiffs, in connection with that part of the defendant's third prayer, (which was also granted,) to the effect that the exemplified copy of the deed offered in evidence by the defendant, is *prima facie* evidence of its execution, and casts the burden of proof on the plaintiffs to show that it was not executed by John Metz, correctly stated the law upon this branch of the case. As Ruth Metz, the life tenant of the land, did not die until 1863, less than twenty years prior to the commencement of this action, the Court was clearly right in granting the plaintiffs' second prayer, to the effect that upon that state of facts the defendant could not make title to the land by possession.

The plaintiffs also assailed the deed of 1821, upon an entirely different ground. They offered evidence tending to show that at the time this deed was executed, John Metz was *non compos mentis*, and incapable from mental infirmity of making a valid deed or contract. The defendant objected to the introduction of this testimony, but the Court overruled the objection and allowed the testimony to go to the jury. This ruling in connection with the instructions granted by the Court upon the same subject, presents the second main question in the case.

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Evans vs. Horan and Preston.

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In considering this question it becomes necessary to determine whether the deed, assuming the party to have been *non compos* at the time, was for that reason absolutely void or merely voidable, for if it was void, it is clear that those who are obstructed by it from the enjoyment of any right can call it in question, and vacate it in any proceeding where its validity may be asserted. *Key vs. Davis*, 1 *Md.*, 39. The exact question which the record presents is this: is a deed of bargain and sale of real estate made upon a valuable consideration, duly acknowledged and duly enrolled or recorded under our Registry Acts, void or merely voidable by reason of the fact that at the time it was executed, the grantor was *non compos mentis*? Without advancing or at all sanctioning the broad doctrine that every act of a lunatic or infant is voidable and not void, we are of opinion that the deed in question does not belong to that class which the law deems absolutely void. This we think has been established as the law of this State, whatever may be the conflict of authority elsewhere. We refer to the cases of *Key vs. Davis*, 1 *Md.*, 32, and *Chew vs. Bank of Baltimore*, 14 *Md.*, 299, and the reasoning and authorities cited and relied on by the Court in those decisions. The cases of *Wait vs. Maxwell*, 5 *Pick.*, 217; *Jackson vs. Gumaer*, 2 *Cowen*, 552, and *Breckenridge vs. Ormsby*, 1 *J. J. Marshall*, 236, are directly in point. Many other more recent decisions of the State Courts to the same effect might be cited, but it is unnecessary, inasmuch as we consider the decisions of our predecessors as having settled the law of Maryland upon this subject. A few brief quotations from the opinion in *Key vs. Davis*, will show the grounds upon which the doctrine is rested, and how cautiously it is guarded and limited. "In England," say the Court, "it appears to be well settled, as it is in this country, where the common law has not been abrogated by statutory enactments, that the *feoffment* of a lunatic or idiot, in person, is only voidable and not

void. The reason assigned for this is, that the solemnity and formalities of livery of seizin, together with the necessary participation of others in the act, and its notoriety, presupposes that the incapacity of the party was not apparent." For this, reference is made, among other authorities, to the case of *Thompson vs. Leach, Carth.*, 435. The Court then adds: "In this State it has been adjudged by the Court of Appeals, in *Matthews vs. Ward's Lessee*, 10 G. & J., 433, that livery of seizin has been abolished, and that enrollment is equivalent to it, and has been substituted in its place. Indeed the Act of 1776 provides for recording deeds of feoffment, as well as other deeds, and the Act of 1715, declares that livery of seizin shall not be necessary where a deed is enrolled. The propriety of this decision, and the results to which it leads no one can controvert. If the acquiescence of those whose presence and participation, which are necessary to constitute a good livery of seizin, are sufficient to rescue the act of the lunatic from the presumption of being totally void, much more ought the attestation of the magistrates who took the acknowledgment, and the clerk's certificate of enrollment which accompanies the deed of bargain and sale of the present day, have a similar effect. From this doctrine it would seem to follow as a necessary consequence, that in this State the deed of bargain and sale of a lunatic, where it has been executed with all the usual formalities required by law, and duly enrolled, would, in any case, like a feoffment in person, be only voidable and not void. But the Court do not wish to be understood as carrying this doctrine any further than the facts in this case warrant, nor do they design to express any opinion upon the character or effect of any other deed or contract of lunatics."

Holding then the deed to be voidable, and not void, it is clear beyond dispute that it can be avoided by the heirs-at-law of the grantor, privies in blood, and the question

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Evans vs. Horan and Preston.

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now is, can they do this in a Court of law in an action of ejectment for the land mentioned in the deed? Here we are confronted with a question which has not been definitely adjudicated in this State. In *Key vs. Davis*, there was a strong intimation that the deed could only be vacated by a proceeding instituted expressly for that purpose, and that its validity could not be questioned in an action of ejectment, but the Court declined to commit itself upon that point. In *Stewart vs. Redditt*, 3 Md., 67, the Court again declined to pass upon the question, whether the deed of a person *non compos mentis* could be attacked in an action at law, and decided the case upon other grounds. In petitions for freedom where the sanity of the grantor executing the deed of manumission, was involved, it was held that that question could be tried in a Court of law, and in a Court of law only; but this decision rested upon the sole ground that the *statute* had designated the particular tribunal in which alone such proceedings should be instituted and conducted, and for that reason cases of that character were held not to be in conflict with the principles announced in *Key vs. Davis*. *Townshend vs. Townshend*, 5 Md., 287; *Negroes Jerry, et al. vs. Townshend*, 9 Md., 145. It is true that in Maryland, as in other States, the sanity of a *testator* may be contested in an action of ejectment between the heirs-at-law, and the devisees of the realty, (*Colvin vs. Warford*, 14 Md. 553;) but such cases do not seem to be analagous to the one now before us, where possession under the deed has been held for a long period of time, and where meliorations and permanent improvements may have been made upon the land by a *bona fide* possessor. It is clear that a Court of equity will not take an estate from an innocent possessor who has made improvements thereon, having no knowledge, in fact, of any defect in his title, and supposing himself to be the absolute owner, without compelling the plaintiff to make some allowance

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Evans vs. Horan and Preston.

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for such improvements. No principle of equity is better established than this. *Jones vs. Jones*, 4 Gill, 87; *McLaughlin vs. Barnum*, 31 Md., 453. Assuming that we are right in holding this deed to be voidable merely, and not void, the defendant, if he be such *bona fide* possessor, is clearly entitled to this equity. Our examination of the authorities has convinced us that in no case has this equity been denied, except in cases where the Courts have held the deed to be absolutely void, or where the proceeding to avoid it has been by the lunatic himself or his guardian. If then in the present case the plaintiffs were allowed to set up in this action the insanity of their deceased brother, the defendant would be deprived of all benefit of this equity, and lose the land without any compensation for improvements he may have made upon it. Reason and justice are therefore strongly in favor of the position that the plaintiffs should be required to assail the deed by a direct proceeding in equity to set it aside, a proceeding in which all the equities between the parties can be properly adjusted, and not to allow them to attack it on this ground in this action, and we accordingly so determine.

It follows there was error in the ruling contained in the second exception, and in the granting of the plaintiffs' first and fourth prayers, and as the judgment must be reversed for these errors it becomes unnecessary to notice the questions raised by the motion in arrest of judgment. A new trial will be awarded in order to enable the plaintiffs, if they so choose, to proceed with the action upon the ground of the non-execution of the deed by John Metz.

*Judgment reversed, and  
new trial awarded.*

(Decided 14th November, 1879.)

SANFORD J. LEWIS vs. EDWARD HIGGINS, EDWARD  
R. E. COBB and JOHN H. FOWLER.

*Attachment under the Act of 1864, ch. 306—Defective pleas in Abatement—Effect of proceedings in Bankruptcy against the defendant, upon the action on the Short note against the defendant, and upon the Attachment—Motion to quash upon the ground that an Attorney of the Court was security upon the Attachment bond—Construction of rule of Court prohibiting Attorneys from becoming Securities for costs, or Securities on appeal bonds.*

In an action of attachment under the Act of 1864, ch. 306, the defendant appeared to the short note case and pleaded in abatement that at the time of the institution of the action "there was on file on the Docket of the District Court of the United States of the District of Maryland, pending for trial, proceedings instituted by the plaintiffs against the defendant, upon the same debt as set forth in this case, for the purpose of having him adjudged a bankrupt." The defendant pleaded a similar plea, making the same averments to the writ of attachment. On demurrer it was HELD:

- 1st. That the plea in the short note case was defective in not averring the essential fact to the sufficiency of the plea, that the proceedings in bankruptcy were pending at the time of the plea pleaded.
- 2nd. That the plea in said case, it being an action *in personam*, was also defective because the simple pendency of the proceedings in bankruptcy constituted no cause of abatement of the action; and it was not alleged or pretended that the cause of action sued on had been *proved* as a claim in the bankruptcy proceedings and thus made subject to the provision of sec. 5105, of the Revised Statutes of the United States.
- 3rd. That although the debt be *provable* in bankruptcy, the most that could be insisted on, under sec. 5106 of the Revised Statutes, would be that upon the application of the bankrupt the action should be stayed to await the determination of the Court in bankruptcy on the question of his discharge.
- 4th. That if for any cause the proceedings in bankruptcy should terminate, or be closed without a discharge, the plaintiffs would be en-

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*Lewis vs. Higgins, et al.*

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titled to a judgment *in personam* against the defendant, and the latter would be liable, whether he be adjudged a bankrupt or not, to pay that judgment out of any property that he might thereafter acquire.

5th. That the plea to the attachment case was defective in not making the essential averment that the Court in bankruptcy had taken cognizance of the petition filed by the plaintiffs.

6th. That in the absence of the necessary averments to show that the Court in bankruptcy had actually taken cognizance of the case, and assumed jurisdiction in the premises, and that the proceedings were still pending at the time of filing the plea, there was nothing shown to preclude the plaintiffs from proceeding against the property of the defendant by way of attachment.

It was further HELD :

1st. That a motion to quash the attachment because an attorney of the Court was one of the sureties in the attachment bond given by the plaintiffs, was rightly overruled.

2nd. That the rule of Court prohibiting attorneys from becoming securities for costs, or securities on appeal bonds, has no application to a case like the present.

APPEALS from the Superior Court of Baltimore City.

This was an attachment instituted under the Act of 1864, ch. 306, by the appellees against the appellant. The attachment was laid in the hands of Francis W. Bennett and Alfred C. N. Mathews, trading as F. W. Bennett & Co. The defendant and the garnishees appeared and pleaded. The case is further stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*Richard Hambleton*, for the appellant.

*William A. Fisher*, for the appellees.

ALVEY, J., delivered the opinion of the Court.

This was an attachment under the Act of 1864, ch. 306. The defendant appeared to the short note case, and



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*Lewis vs. Higgins, et al.*

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pleaded in abatement, that at the time of the institution of this action "there was on file on the Docket of the District Court of the United States of the District of Maryland, pending for trial, proceedings instituted by the plaintiffs against the defendant, upon the same debt as set forth in this case, for the purpose of having him adjudged a bankrupt." The defendant pleaded a similar plea, making the same averments, to the writ of attachment; and to both of which pleas the plaintiffs demurred, and the Court below sustained the demurrers. Upon trial of other issues made by the pleadings, judgment was rendered against the defendant in the short note case, and judgment of condemnation was rendered against the garnishees in the attachment case; and from both of which judgments the defendant has appealed. These appeals, however, are only intended to present to this Court the questions arising under the demurrers to the pleas in abatement.

As to the plea in abatement in the short note case, that is defective in several respects. In the first place, it does not aver that the proceedings in bankruptcy were pending at the time of the plea pleaded, which is an essential fact to the sufficiency of the plea. Those proceedings, though they may have been pending at the time of the institution of the present action, may have been withdrawn or dismissed before this plea was filed by the defendant. But, besides this fatal omission in the averments, the plea is otherwise defective. This is an action *in personam*, and the simple pendency of the proceedings in bankruptcy constituted no cause of abatement of the action. It is not alleged or pretended that the cause of action here sued on has been *proved* as a claim in the bankruptcy proceedings, and thus made subject to the provision of sec. 5105 of the Revised Statutes of the United States; and though the debt be *provable* in bankruptcy, the most that could be insisted on, under sec. 5106, of the Revised

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Lewis vs. Higgins, et al.

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Statutes, would be that, upon the application of the bankrupt, the action should be stayed to await the determination of the Court in bankruptcy on the question of his discharge. If, for any cause, the proceedings in bankruptcy should terminate or be closed without a discharge, the plaintiffs would be entitled to a judgment *in personam* against the defendant, and the latter would be liable whether he be adjudged a bankrupt or not, to pay that judgment out of any property that he might thereafter acquire. *Norton vs. Switzer*, 93 U. S., 355, 360; *The Brandon Manf. Co. vs. Frazer*, 47 Vt., 88; *Ray vs. Wight*, 119 Mass., 426.

But the plea to the attachment depends upon somewhat different principles. The attachment is a proceeding *in rem*, by which the plaintiffs sought to seize the property of the defendant and apply it exclusively to the discharge of their claims. This would be in plain contravention of the policy of the bankrupt law, if the defendant at the time was subject to the provisions of that law; and therefore, to avoid any such undue preference, if the attachment be sued out at any time within four months next preceding the commencement of the bankruptcy proceedings, and *a fortiori* if after the commencement of those proceedings, the law, U. S. Rev. Stats., sec. 5044, declares such attachment to be dissolved by the assignment in bankruptcy. Such attachment, as said by the Supreme Court, "is avoided and made of no effect, and the proceedings under it are held for naught. The money obtained by color of it is money held for the assignee, and is recoverable by him." *West Phila. Bank vs. Dickson*, 95 U. S., 180, 182; *Yeatman vs. Sav. Inst., Id.*, 764. The plea, however, is defective in not making the essential averment that the Court in bankruptcy had taken cognizance of the petition filed by the plaintiffs. The proceeding was to have the defendant declared an involuntary bankrupt; and by sec. 5024, U. S. Rev. Stats., it is provided that

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Lewis vs. Higgins, et al.

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upon filing the petition authorized to be filed for the purpose of having the party adjudicated a bankrupt, "*if it appears that sufficient ground existed therefor*, the Court shall direct the entry of an order requiring the debtor to appear and show cause, at a Court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted." Whether the Court ever determined that sufficient ground existed for proceeding on the petition, or whether any order was ever passed thereon against the defendant, according to the direction of the statute, as a preliminary proceeding to requiring the defendant to answer, the plea omits to aver. It may be, for aught that appears, that the proceedings had been dismissed or otherwise terminated, before plea filed, without any such preliminary proceeding, and, consequently, without any adjudication of bankruptcy against the defendant, or the appointment of an assignee to take charge of the property. In the absence of the necessary averments to show that the Court in bankruptcy had actually taken cognizance of the case, and assumed jurisdiction in the premises, and further, that the proceedings were still pending at the time of filing the plea, there is nothing shown to preclude the plaintiffs from proceeding against the property of the defendant by way of attachment. The Court below, therefore, was clearly right in sustaining the demurrers and adjudging the pleas bad in both cases.

The motion to quash the attachment because an attorney of the Court was one of the sureties in the attachment bond given by the plaintiffs, was rightly overruled. The rule of Court prohibiting attorneys from becoming securities for costs, or securities on appeal bonds, has no application to a case like the present.

*Judgments affirmed.*

(Decided 12th December, 1879.)

H. H. HARTSOCK *vs.* WILLIAM E. RUSSELL.

*Mistake—Resulting Trust—Guardian and Ward—Question as to the rights of a Judgment creditor of a Guardian, as against property conveyed to the Guardian to secure a Loan of his Ward's money, where the Deed was absolute on its face and did not disclose the Trust—The Registry Laws, and sec. 23 of Art. 16, and sec. 29 of Art. 24 of the Code, not applicable to the Case—Effect of the discharge of the Guardian under the Bankrupt laws upon the rights of the Ward.*

By order of the Orphans' Court, O. as guardian of R. was authorized to loan to W. and D. a sum of money which as such guardian he had in his hands for investment, the same to be secured by mortgage on real estate. The loan was made to the parties named who as security therefor executed to O. an assignment of certain reversionary rights and interests in and to certain lots of ground in the City of Cumberland, said assignment being made to O. in his own name and without reference to his character as guardian. The loan was always treated and dealt with by O. as belonging to the estate of his ward, and he intended the assignment to be made to him as guardian, and neither he nor the other parties to it knew or understood that it was not so drawn, and made to express the real intention and object of the parties. After the recording of the assignment, certain judgments were recovered against O. upon one of which, rendered for a debt contracted subsequent to the recording of the assignment, an execution was issued, and levied upon the property assigned. Subsequent to the recovery of this judgment O. applied for the benefit of the bankrupt law, and obtained his final discharge thereunder. On a bill filed by R. after attaining his majority, praying to have the judgment creditors of O. restrained by injunction from proceeding by way of execution against the property embraced in the assignment, it was **HELD** :

- 1st. That as between R. and O. the former was entitled to relief either on the ground of mistake, or of a resulting trust.
- 2nd. That the judgment creditor of the trustee, whether he became such before or after the creation of the trust, in a case like the

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Hartsock vs. Russell.

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present, had no superior equity as against the property, to that of the *cestui que trust*, whether the conveyance be taken in the name of the trustee by mistake, or by design of the trustee, unaffected by any act or bad faith on the part of the *cestui que trust*.

3rd. That the Registry laws have no application to a case like the present.

4th. That sec. 23 of Art. 16 of the Code, had no manner of application to the case, the deed in question having been duly recorded within the time prescribed, and the creditors seeking to charge the property not being the creditors of the party making the deed, but of the party to whom the deed was made.

5th. That no question could arise in the case under sec. 29 of Art. 24 of the Code, requiring an affidavit of the mortgagee to the *bona fides* of the consideration for the mortgage.

6th. That the discharge of O. under the Bankrupt law, in no way affected R's right to relief, as by sec. 5053 of the Revised Statutes of the United States, no property held by him in trust was allowed to pass to his assignee in bankruptcy.

APPEAL from the Circuit Court for Allegany County, in Equity.

The bill in this case was filed by the appellee for the purpose of procuring a decree to correct a mistake, which was charged to have been committed in the execution of an instrument of writing of the 13th of December, 1873, by William Walsh and Bernard A. Dougherty, to Charles H. Ohr, instead of to Charles H. Ohr, as guardian of the complainant, and to have a conveyance of said property to himself. The bill averred that Ohr was the complainant's guardian, and as such had a large sum of money in bank, and that under an order of the Orphans' Court, dated the 16th of December, 1873, he loaned the sum of \$3300, to said Walsh and Dougherty, and took from them the aforesaid instrument of the 13th of December, 1873, as security for such loan. The instrument was very informally drawn. It set out as follows: "For value

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Hartsock vs. Russell.

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received, we hereby assign, grant and set over to Charles H. Ohr, the following lease and leasehold properties, with all the powers, privileges and benefits therein contained, to wit;" and then proceeded to describe three several leases, executed by Walsh and Dougherty, to different persons, and describing such leases by reference to their dates, where recorded, or to be recorded, and the amount of rental reserved in each to the grantors. This instrument was duly executed, acknowledged and recorded within time. On the 1st of January, 1877, the appellant obtained a judgment against Ohr, and subsequently caused an execution to be issued thereon, under which Edward Manly, sheriff, levied upon the properties mentioned in the deed from Walsh and Dougherty to Ohr. A judgment was also obtained against Ohr, by one George W. Broestler. The bill prayed that the instrument in question might be reformed so as to conform to the intention of the parties, and that Ohr might be decreed to convey all the interest in said leasehold properties, he might have acquired by virtue of the said instrument, to the complainant; and further prayed an injunction to restrain Hartsock, Broestler and the sheriff from making sale of said properties under any execution on said judgments to satisfy the same; and for general relief. An injunction was issued. A motion was made to dissolve the injunction. The Court (PEARRE, J.) passed an order refusing the motion and continuing the injunction until the final hearing. From this order the present appeal was taken.

The cause was argued, by agreement of counsel, before BARTOL, C. J. and ALVEY and IRVING, J., and the decision was participated in by MILLER and ROBINSON, J.

*Benjamin A. Richmond*, for the appellant.

*S. A. Cox*, for the appellee.

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Hartsock vs. Russell.

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ALVEY, J. delivered the opinion of the Court.

This is an application on the part of the appellee to obtain the benefit of a conveyance or assignment of certain reversionary rights and interests in and to certain lots of ground in the city of Cumberland, executed by Walsh and Dougherty to Charles H. Ohr, and which assignment, as it is alleged, was taken by Ohr as guardian of the appellee, and for the latter's benefit, though the instrument of assignment, by its terms, is to Ohr in his own right, and without reference to his character of guardian.

It is alleged and shown, indeed admitted by the defendants, that Ohr was the guardian of the appellee, and that, as such guardian, he had in his hands certain money of his ward for investment; that, on the 16th of December, 1873, the Orphans' Court passed an order authorizing him, as guardian, to loan of his ward's money the sum of \$3,300 to Walsh and Dougherty, the same to be secured by mortgage on real estate; that such sum was loaned to the parties named, and thereupon they made to Ohr, as security for the loan, the assignment of the 13th of December, 1873; that such loan has been uniformly treated and dealt with by Ohr as belonging to the estate of his ward, and that he has never, in any manner whatever, claimed or pretended that he had any right or interest in the loan thus made and secured, other than as guardian of the appellee. It is also alleged, and by agreement admitted, that Ohr intended the instrument of assignment to be made to him as guardian, and that neither he nor the other parties thereto knew or understood that it was not so drawn, and made to express the real intention and object of the parties, until the appellant Hartsock had levied execution on the property assigned as the individual property of Ohr.

It is further stated in pleading, and admitted by agreement, that after the date of the assignment and the recording thereof, the judgments of Hartsock and Broest-

ler were obtained against Ohr, and that execution was issued on the judgment recovered by Hartsock, which was levied on the property assigned, and that the judgment was for a debt contracted subsequent to the date and recording of the assignment.

It is also alleged and admitted, that since taking the assignment, and the recovery of the judgments just mentioned, Ohr has applied for the benefit of the bankrupt law, and has received his final discharge thereunder; and that, although the appellee has attained his age of majority, he has not received any portion of the money loaned to Walsh and Dougherty, and that they have paid no part of the principal sum loaned.

The instrument in question is very informally and inartificially drawn, but as the sheriff, by his levy, and all the parties concerned, appear to treat it as a grant or assignment of the reversion in the lands leased, carrying the right to the rents as an incident, we take that to be the real intent and object of the paper, and shall so treat it in determining the rights of the parties as they are presented on the record before us.

Upon the facts of the case as we have stated them, which are all admitted by the defendants, the appellee founds his claim to relief, first, upon the fact of mistake and inadvertence in the draft of the instrument, and prays that it may be rectified; and secondly, as an alternative, inasmuch as it is an admitted fact that his money formed the only consideration for the assignment, he prays that he may have the benefit of it by way of resulting trust. He also prays to have the judgment creditors of Ohr restrained by injunction from proceeding by way of execution against the property embraced in the assignment, and for general relief.

The judgment creditors of Ohr thus sought to be restrained, while they admit the facts relied on by the appellee, insist that the rights and equities of the appellee



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Hartsock vs. Russell.

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are subordinate to those asserted by them in their character of judgment creditors, and that a Court of equity is powerless to afford the relief prayed.

If this were a case as between the appellee and Ohr, it is fully conceded on the part of the appellant there could be no question of the appellee's right to relief in either aspect in which the case is presented. The fact of the mistake in the preparation of the instrument is made out in the clearest and most satisfactory manner; and that the sole consideration for the assignment was the money of the appellee, loaned under the order of the Orphans' Court, is in no manner disputed. But apart from all question of mistake, the principle is perfectly well settled, and is founded in the plainest dictates of justice, that if a guardian or other trustee be authorized to purchase land or take a mortgage for his ward or *cestui que trust*, and he makes the purchase with the trust money, but takes the conveyance in his own name, without any declaration of the trust, or indication in what character he holds it, a Court of equity will always be prompt to declare the property thus acquired to be held as a resulting or constructive trust, for the benefit of the party whose money has been so invested. In such case, the Court will presume that the trustee meant to act in pursuance of his trust, and not in violation of it. 2 *Sto. Eq.*, sec. 1210, and the authorities there cited. Such being the well established doctrine of a Court of equity, the question here is, whether the position of a judgment creditor of the trustee is such as to give him a superior equity as against the property thus held, to that of the *cestui que trust*, whether the conveyance be taken in the name of the trustee by mistake, or by design of the trustee, unaffected by any act or bad faith on the part of the *ce-tui que trust*? That the judgment creditor of the trustee, whether he becomes such before or after the creation of the trust, in a case like the present, has no such superior equity would

appear to be plain upon the most obvious principles of justice.

The judgment lien fastens only upon the beneficial interest of the debtor in the land, especially as that lien is regarded by a Court of equity. If the interest of the debtor be a legal estate, subject to an equity that can be enforced, the judgment will be a charge upon the estate subject to that equity; and if the interest be an equitable estate only, the judgment will be a charge upon that interest and nothing more. "Upon a judgment obtained against a mere trustee, a Court of equity would never permit the trust property to be applied in satisfaction of the judgment; and for the same reason, if the property is subject to a trust short of its full value, the judgment can only in equity affect that which remains after the trust is satisfied, for this alone is the property of the debtor." 1 *Phill. Ch.*, 730. This principle has been repeatedly acted on in this Court, and is the foundation of the decisions in several cases; as, for instance, the case of *Hampson vs. Edelen*, 2 *H. & J.*, 64, where the vendor held the legal title of the land sold, in trust for the vendee; and, again, the case of *Repp vs. Repp*, 12 *Gill & J.*, 341, where the vendee took the legal title, absolute on the face of the deed, but subject to a charge in favor of his brothers and sisters created by contract not of record. In these cases it was held that the rights and equities of the parties claiming under the contracts were paramount and superior to that of any judgment creditor of the holder of the legal title, becoming such judgment creditor subsequent to the date of the contracts of purchase; and consequently no judgment liens attached as against those parties. When and as against whom a judgment lien will or will not attach, and the nature of that lien, are subjects that have been recently considered by this Court, and without restating the propositions then decided, we

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Hartsock vs. Russell.

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need only refer to the cases of *Knell vs. The Green St. Build. Assoc.*, 34 Md., 67, and *Dyson vs. Simmons*, 48 Md., 207. Suffice it to say, that the principles there laid down are in strict accordance with what we decide in this case.

But it is insisted, on the part of the judgment creditors, that the Registry laws of the State forbid the granting the relief prayed; that because the assignment is in terms absolute, without mention of the object for which it was taken, showing of record an apparent right to the property in the assignee, therefore, as against his judgment creditors, the appellee is precluded from showing either the mistake or the circumstances that would give rise to the resulting or constructive trust as against Ohr, the judgment debtor. Such, however, we apprehend not to be the case. On the contrary, we think it clear, the Registry laws have no application to a case like the present. If the appellee could be thus precluded, the most flagrant injustice would be done, and the Court stayed in affording relief upon what may be regarded as among the plainest and best established principles of its jurisdiction. As has been well said, a Court of equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the real intention of the parties. It would be to allow an act, originally innocent, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake, to resist the claims of justice, under the shelter of statutes framed to promote it. This a Court of equity will never allow. 1 *Sto. Eq.*, sec. 155. See also same vol., sec. 165. The sec. 23 of Art. 16 of the Code, relied on for the appellant, has no manner of application to the case. That section of the statute contemplates, and only contemplates, the case of the debtor having made a deed which has not been duly recorded, but which may be recorded under a decree of a Court of equity. It simply provides, in respect to

the creditors of the grantor, that the recording of the deed under the decree shall not "in any manner affect the creditors of the *party making such deed*, who may trust such party after the date of the said deed." Here the deed has been duly recorded within the time prescribed, and the creditors seeking to charge the property are not the creditors of the party making the deed, but of the party to whom the deed was made.

Nor can any question arise here under sec. 29 of Art. 24 of the Code, requiring an affidavit of the mortgagee to the *bona fides* of the consideration for the mortgage. If the instrument involved be regarded as a mortgage, and therefore within the purview of the statute, it is perfectly good and valid as between the parties thereto, and those claiming through or under the mortgagee, without regard to the affidavit. No creditor or purchaser of Walsh or Dougherty is asserting claim or title against the operation of the instrument, and the attempt by the judgment creditors of Ohr to seize and apply the property to the payment of their judgments, amounts to an affirmation, on their part, of the validity of the assignment to their debtor. Indeed they are in no position to question the validity of the assignment for want of an affidavit under the statute.

As we have already stated, Ohr has been discharged under the bankrupt law of the United States; but that fact in no way affects the appellee's right to relief; for, by the Rev. Stats. U. S., sec. 5053, no property held by the bankrupt in trust was allowed to pass to his assignee in bankruptcy. And as to the effect of the bankrupt's discharge upon the right of his judgment creditors to proceed by execution against the property involved, that is a question that becomes unnecessary for this Court to consider, in the view taken of the case.

We shall therefore affirm the order appealed from, continuing the injunction, and remand the cause, to the end that there may be a decree passed by the Circuit Court

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Culbertson vs. Smith.

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giving the appellee relief in accordance with the principles stated in the foregoing opinion.

*Order affirmed, and  
cause remanded.*

(Decided 12th December, 1879.)

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SAMUEL CULBERTSON vs. MARTHA McD. SMITH.

*Action on the Guaranty of a Single bill—Effect of a blank Endorsement made Subsequent to the delivery of the Single bill; and also of a Guaranty written over said Endorsement—Effect of Evidence to show that the Instrument was not to be considered complete until the Endorsement was made—Statute of Frauds, 29 Car. II, ch. 3, sec. 4.*

M. McD. S., the mother of G. G. S., wrote her name across the back of a single bill made by G. G. S. in favor of S. C. The indorsement was written about nine months after the date and delivery of the single bill. The payee sued M. McD. S. as upon a guaranty of the payment of the bill; and at the trial wrote over her blank indorsement the following: "In consideration of the loan of the money mentioned in the within single bill to my son, and in fulfilment of his representations to the payee that I would guarantee or become the surety for the payment of the money, and in consideration of the payee's promise and agreement not to press the payment of this single bill at its maturity, and to forbear suit thereon for two years or more; I hereby guarantee the payment thereof to the said S. C. should G. G. S. make default in payment thereof." In order to meet the defence taken by the defendant, that there was no sufficient writing to gratify the requirement of the Statute of Frauds, and that there was no sufficient consideration for the alleged undertaking, the plaintiff offered evidence for the purpose of showing that the contract as between himself and G. G. S. resulting in the making and delivery of the single bill was not complete and

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Culbertson vs. Smith.

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executed until the blank indorsement was placed thereon by the defendant; that the single bill had been made and delivered provisionally only, previous to that time; that it was contemplated from the beginning of the transaction that the defendant would become surety for the ultimate payment of the money loaned, and for which the single bill was given, and that the money was loaned upon that assurance and understanding as between the original parties to the single bill. **HELD:**

- 1st. That notwithstanding the parol evidence offered by the plaintiff, the Statute of Frauds presented an insuperable barrier, and he could not recover.
- 2nd. That the note being under seal the party placing her name upon the back of the note, could not be regarded as a joint obligor with the maker of the note, nor could she be regarded as an indorser in the ordinary sense of that term, which implies obligation to pay, as upon a negotiable note.
- 3rd. That the circumstances of the case all repelled the idea that there was anything inchoate or incomplete in regard to the binding effect of the note itself as between the original parties to it.
- 4th. That the blank indorsement having been placed upon the note nine months after its date and delivery, that indorsement, if it could have any effect at all, could only be effective as a guaranty.
- 5th. That the mere blank indorsement of the defendant, a third party, on the single bill, could not be construed into such an agreement or note in writing as would gratify the Statute of Frauds, 29 Car. II, ch. 8, sec. 4; nor was the Statute gratified either in its letter or object, by the subsequent writing placed over the signature of the defendant by the plaintiff.

**APPEAL** from the Circuit Court for Washington County.

This action was instituted by the appellant against the appellee.

The case is stated in the opinion of the Court.

The prayers of the plaintiff, which the Court (PEARRE and MOTTER, J.) rejected, are omitted, as they are of unusual length, and their insertion would only encumber the case, without serving to elucidate the questions involved, which are fully presented in the opinion of this Court.

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Culbertson vs. Smith.

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The defendant offered no prayers. The Court instructed the jury as follows:

If the jury shall find that the single bill, offered in evidence in this case, was executed by George G. Smith, and delivered to the plaintiff on the 1st of May, 1871, and that the plaintiff, at that time, loaned to the said Smith, the money mentioned therein; and that in February, 1872, the defendant endorsed her name in blank on said single bill, and that at the trial of this cause the plaintiff, by his attorney, wrote over said blank signature the undertaking now appearing thereon and offered in evidence to the jury, the plaintiff cannot recover in this action, because the said undertaking for both or either of the considerations therein expressed, is within the fourth section of the Statute of Frauds, and there is no evidence in this cause which shows any compliance with the said Statute—that is, a written agreement or any note or memorandum thereof, signed by the said defendant.

The plaintiff excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before BARTOL, C. J., BOWIE, BRENT, MILLER, ALVEY and IRVING, J.

*Louis E. McComas* and *Andrew K. Syester*, for the appellant.

*H. Kyd Douglas*, for the appellee.

ALVEY, J., delivered the opinion of the Court.

This action is founded upon what is alleged to be a guaranty by the appellee of payment of a single bill, made by George G. Smith, the son of the appellee, to the appellant, for \$3,663.

The single bill is dated the 1st of May, 1871, and is made payable twelve months after date. It was, on the

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Culbertson vs. Smith.

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day of its date, delivered to the appellant for money borrowed by Smith; and about nine months thereafter, the appellee wrote her signature, without any thing more, across the back of the note; and over this blank indorsement the appellant, at the trial below, wrote the following:

“In consideration of the loan of the money mentioned in the within single bill to my son, and in fulfilment of his representations to the payee that I would guarantee or become surety for the payment of the money, and in consideration of the payee's promise and agreement not to press the payment of this single bill at its maturity, and to forbear suit thereon for two years or more, I hereby guarantee the payment thereof to the said Samuel Culbertson, should George G. Smith make default in payment thereof.”

The appellee pleaded that she never promised, or was never indebted, as alleged, and that she never made the guaranty alleged; and she resisted the appellant's right to recover upon two grounds: 1. That there was no sufficient writing to gratify the requirement of the Statute of Frauds; and, 2. That there was no sufficient consideration for the alleged undertaking. There was an agreement that all errors in pleading should be waived, and that either party should be at liberty to introduce any evidence that would be admissible under a proper state of pleading.

In answer to the defence of the appellee, the appellant contends, and offered evidence for the purpose of showing, that the contract as between the appellant and George G. Smith, resulting in the making and delivery of the single bill, was not complete and executed, until the blank indorsement was placed upon the single bill by the appellee; that the single bill had been made and delivered provisionally only, previous to that time; that it was contemplated from the beginning of the transaction,



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Culbertson vs. Smith.

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that the appellee would become surety for the ultimate payment of the money loaned, and for which the single bill was given, and that the money was loaned upon that assurance and understanding, as between the original parties to the single bill. But, notwithstanding the parol evidence offered by the appellant, the Court below held that the Statute of Frauds constituted an insuperable barrier, and that the appellant could not recover; and, after careful consideration, we fail to discover any ground upon which that ruling can be successfully questioned.

In the case of promissory notes, and also of non-negotiable notes, not under seal, questions often arise as to the effect of a blank indorsement placed thereon by a party other than the payee or his indorsee, the question, in such case, being whether the party thus indorsing should be held liable as an indorser, or as an original promisor. *Story's Pro. Notes*, sec. 473. And in all such cases, in order to construe such blank indorsement into a joint original promise with that expressed upon the face of the note, it is necessary that it should appear either that the signature was placed on the note at the time it was made or before it passed to the payee, or so soon thereafter, and under such circumstances, as will give it relation to the original making of the note. This is the principle of many of the cases relied on by the appellant; as, for example, *Moris vs. Bird*, 11 *Mass.*, 436. In that case it was held, that although the blank indorsement was placed upon the note subsequent to the time at which the note was made and delivered by the principal debtor, yet the act of placing the signature upon the note should be referred to the date of the note; and that the party thus signing the note in execution of a previous promise should be held to assent to such reference, so as to be considered as having placed his name upon the note before it was passed to the payee, and thus be made an original promisor. So in the case of *Samson vs. Thornton*, 3 *Metc.*, 275,

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Culbertson vs. Smith.

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and again in the case of *Union Bank vs. Willis*, 8 Metc., 504. And in the case of *Hawkes vs. Phillips*, 7 Gray, 284, much relied on by the appellant, it was held, that where a person, not a party to a promissory note, who, after its delivery to the payee, placed his name upon the back of it, pursuant to an agreement made with the payee *before* the making of the note, though without the knowledge of the maker, was liable on the note as a joint maker. These cases, and others decided upon the same principle, are not within, and therefore not affected by, the Statute of Frauds, and, consequently, parol evidence was admissible for the purpose of showing the circumstances under which the signatures were placed on the notes.

But in the case under consideration, the note being under seal, the party placing her name upon the back of the note cannot be regarded as a joint obligor with the maker of the note, nor can she be regarded as an indorser in the ordinary sense of that term, which implies obligation to pay, as upon a negotiable note. The circumstances of the case, moreover, all repel the idea that there was any thing inchoate or incomplete in regard to the binding effect of the note itself, as between the original parties to it. The note must speak for itself. It is an unqualified promise to pay, after the lapse of a definite period of time, under the hand and seal of the debtor. It was duly delivered, and thereby the original debt was merged, and it has ever since been held by the payee; and there can be no question of its being completely binding upon the maker, irrespective of the fact whether the appellee had ever indorsed it or not. The blank indorsement having been placed upon this note nine months after its date and delivery, that indorsement, if it could have any effect at all, could only be effective as a guaranty, and that is the nature of the contract as expressed by the appellant in the writing over the signature of the appellee.

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Culbertson vs. Smith.

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Such being the case, the important question is, whether the blank indorsement of the appellee authorized the writing of such contract over the signature as has been written, and whether that contract can be enforced under the Statute of Frauds, 29 *Car.*, II, chap. 3, sec. 4, which provides "that no action shall be brought whereby to charge the defendant upon *any special promise* to answer for the debt, &c., of another person, &c., unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be *in writing*, and signed by the party to be charged therewith," &c.

In England, prior to the Mercantile Law Amendment Act of 19 and 20 Vict., chap. 97, sec. 3, which made a change in this respect, the construction of the foregoing provision of the Statute of Frauds was established, to the effect, that the word *agreement* should be understood as requiring written evidence of the consideration for the promise as well as the promise itself; and therefore, when one promised in writing to pay the debt of a third person, without stating on what consideration, it was held that parol evidence of the consideration was inadmissible, and, consequently, such promise, appearing to be without consideration upon the face of the written engagement, was *nudum pactum*, and gave no cause of action. This was the construction adopted in the leading case of *Wain vs. Warlters*, 5 *East*, 10, and that construction has been, without qualification, adopted in this State, and strictly adhered to in all the decisions of this Court. *Wyman vs. Gray*, 7 *H. & J.*, 409; *Elliot vs. Giese*, *Ib.*, 457; *Aldridge & Higdon vs. Turner*, 1 *G. & J.*, 427; *Nabb vs. Koontz*, 17 *Md.*, 283; *Mitchell vs. McCleary*, 42 *Md.*, 374; *Deutsh vs. Bond*, 46 *Md.*, 164; *Ordeman vs. Lawson & Bro.*, 49 *Md.*, 135.

Of the undertakings within this provision of the Statute of Frauds, there are two classes which should be carefully discriminated, the one from the other. In the first are

cases in which the guaranty or promise is collateral to the principal contract, but is made *at the same time*, and becomes an essential ground of the credit given to the principal debtor. In such case, there is not, nor need be, any other consideration than that moving between the creditor and the original debtor. And in the second class are cases in which the collateral undertaking is subsequent to the creation of the debt, and is not the inducement thereto, although the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. In this case, there must be some further consideration shown, having an immediate respect to such liability; as the consideration for the original debt will not attach to the subsequent collateral promise. *Story Pr. Notes*, sec. 457; 1 *Pars. on Contr.*, 496; *Leonard vs. Vredenburg*, 8 *John.*, 29.

To the first of these classes the cases of *Nabb vs. Koontz* and *Mitchell vs. McCleary* belong, in which the guaranties were held good; and to the second class the cases of *Elliott vs. Geise*, and *Aldridge & Higdon vs. Turner*, belong, in which the guaranties were held bad, because, while the promises were sufficiently expressed, there was a failure to express in writing the consideration upon which they were founded.

In the case of *Nabb vs. Koontz*, *supra*, the defendant, at the foot of a promissory note of a *fême covert*, made payable to the plaintiff, *for value received, at the same time* of the making and delivery of the note, wrote and signed the following guaranty: "I hereby guarantee the payment of the above note on maturity." The question in that case was, whether the guaranty sufficiently expressed the consideration, to gratify the Statute of Frauds; and this Court held that it did. The writing signed by the party sought to be charged clearly expressed the promise, and by reading the written promise of guaranty, made simultaneously with the note, as referring to the note,

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Culbertson vs. Smith.

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and as part of one and the same transaction, the consideration for the guaranty was made sufficiently apparent by writing. The consideration that supported the note equally supported the guaranty. And upon the same principle the case of *Mitchell vs. McCleary*, *supra*, and also that of *Coldham vs. Showler*, 2 Car. & K. N. P., 261, were decided; and many other cases to the same effect might be cited.

There are cases to be found where parol evidence has been admitted to support guaranties sought to be enforced, by showing the consideration for the undertaking; but those decisions have been made in States, as in Massachusetts and others, where it is held, that the promise only, and not the consideration, need appear on the face of the guaranty itself. *Packard vs. Richardson*, 17 Mass., 122. But, as we have shown, this is not the law of this State. Here the effort is to supply by parol evidence, not only the consideration, but the promise also; and if such a guaranty as is here attempted to be made out, by the evidence produced, could be enforced, it would be in the teeth of the plain terms of the Statute of Frauds, and would let in all the evils that it was the design of that Statute to exclude. Indeed, it would seem to be too plain for question, that a mere blank indorsement of a third party on an instrument, such as we have in this case, cannot be construed into such an agreement or note in writing as will gratify the Statute; nor is the Statute gratified, either in its letter or object, by the subsequent writing placed over the signature of the appellee by the appellant. See cases of *Jack vs. Morrison*, 48 Penn. St., 113; *Shafer vs. F. & M. Bank*, 59 Penn. St., 144, and *Wilson vs. Martin*, 74 Penn. St., 159.

The case of *Gist vs. Drakely*, 2 Gill, 330, though much relied on by the appellant, has no application to this case. There, it is true, the notes were under seal, and they were indorsed by the defendant in blank, and he was held liable

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Culbertson *vs.* Smith.

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thereon. But such indorsements were made under special arrangement, and before the notes were delivered to the payee; and these notes, thus indorsed, were used for the benefit of the defendant, and as means of paying his own individual indebtedness to the corporation, in whose name the notes were made. In that case, both the defendant and the corporation were liable, not upon a joint, but upon several original undertakings. The promise of each was a direct, original promise, founded upon the same consideration, in which both were interested. The credit was not given solely to either, but to both, as separate contractors, upon co-existing contracts, one under seal and the other not, but both contracts forming parts of the same general transaction. *De Wolf vs. Rabaud*, 1 *Pet.*, 476, 499. Such a contract is not within the provision of the Statute of Frauds, and hence, in the decision, there is no reference to the Statute.

With these views of the principles of law that control the case, this Court is of opinion that the several prayers offered by the appellant for instruction to the jury were properly rejected, and that there was no error in the instruction actually given by the Court below; and the judgment must, therefore, be affirmed.

*Judgment affirmed.*

(Decided 16th December, 1879.)

STATE OF MARYLAND vs. THOMAS WILSON, PRESIDENT  
OF THE BALTIMORE CEMETERY COMPANY.

*Capital Stock of a Corporation—Taxation—Exemption from  
taxation—Taxable and Non-taxable property of a Cemetery  
Company.*

It is the settled law of this State, that the capital stock of a corporation is, for the purpose of taxation, the representative of its property, and the exemption of the one carries with it the exemption of the other.

An exemption from taxation exists only where it is expressed in explicit terms, and it cannot be extended beyond the plain meaning of those terms.

The charter of a Cemetery Company entitled to hold real and personal property, provided that the "land of the company dedicated to the purposes of a cemetery, shall not be subject to taxation of any kind." **HELD:**

1st. That this embraces the land with the permanent improvements thereon, but not a fund invested in stocks, the interest of which is devoted to the maintenance of the cemetery.

2nd. That its capital stock being, therefore, represented by non-taxable real estate, and taxable personal property, is taxable to the extent that the taxable element enters into and forms part of its value, and to that extent only.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON and IRVING, J.

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State *vs.* Wilson, Pres't of the Balto. Cemetery Co.

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*John H. Handy and Charles J. M. Gwinn, Attorney-General, for the appellant.*

*William A. Fisher, for the appellee.*

MILLER, J., delivered the opinion of the Court.

The appeal in this case is from a *pro forma* order dismissing a petition for a *mandamus* to compel the President of the "Baltimore Cemetery Company," to pay to the Treasurer, State taxes assessed upon the *capital stock* of that Company for the years 1872 to 1875 inclusive. The shares of stock were assessed by the Comptroller at their par value of \$100 each. The Company insists that its capital stock is exempt from taxation by reason of the exemption of its *property* contained in its charter. The answer relies upon this defence, and also insists that the assessments were grossly in excess of the value of the shares. By the Acts of 1867, ch. 341, sec. 2, and 1874, ch. 483, sec. 3, "all grave-yards, cemeteries, and burying grounds" were exempted from taxation, but the answer makes no reference to these laws, and it is clear they confer no broader exemption than that contained in the Company's charter. Nor has the Act of 1876, ch. 260, anything to do with this case. Under that Act the *property* of the Company was assessed for *subsequent* taxation, and in the case of *The Appeal Tax Court of Baltimore City vs. The Baltimore Cemetery Company*, 50 Md., 432, the question was whether certain permanent improvements upon the Company's land were within the exemption contained in its charter, and it was held that the exemption necessarily included not only the land, but also the permanent improvements thereon, which formed part of the realty, and were used for the purpose of a public cemetery, and which were essential to the use and enjoyment of the land for the purpose contemplated by the charter. In the present case the *capital stock* of the Company has been assessed



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State *vs.* Wilson, Pres't of the Balto. Cemetery Co.

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and taxed for the four years prior to the passage of the Act of 1876, and an entirely different question arises.

It has been too well settled in Maryland, by the repeated decisions of this Court, to admit of further discussion, that, for the purpose of taxation, the capital stock of a corporation is the representative of its property, that both cannot be taxed, and that the exemption of the one carries with it the exemption of the other. We must inquire then how far the stock of this corporation is represented by non-taxable or taxable property. Its charter is the Act of 1849, ch. 71, and as this law was passed prior to the adoption of the Constitution of 1851, its provisions are, of course, not subject to alteration or repeal by the Legislature.

By this Act the corporation which it creates was clothed with power to purchase, and hold *land*, not exceeding one hundred acres, for the purpose of a public cemetery, also to receive gifts and bequests for the purpose of improving and ornamenting the same, and to hold such *personal property* as may be requisite to carry out the object of the Act. It further provides that the capital stock of the Company shall be represented by one thousand shares, of one hundred dollars each, divided among the proprietors according to their respective interests, and transferable in such manner as the By-Laws may direct. It is then, by sec. 7, enacted, "that burial lots in said Cemetery shall not be subject to the debts of the lot-holders thereof, *and the land of the Company dedicated to the purposes of a Cemetery shall not be subject to taxation of any kind.*" By section 9, it is provided "that annually, on the first days of January and July after the year 1851, the sum of \$250 shall be set apart out of the proceeds of the sale of lots and burial fees, which the President and managers shall invest in some safe and productive fund, the interest of which shall be payable semi-annually or annually, which interest, when received, is again, as early as prac-

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State *vs.* Wilson, Pres't of the Balto. Cemetery Co.

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licable, to be invested, until the said semi-annual appropriations and accruing interest shall form a principal sum of \$50,000, and the interest thereafter accruing shall be devoted exclusively to the maintenance of said cemetery in good order."

Applying then the settled principles of construction in such cases, that an exemption from taxation can exist only where it is expressed in explicit terms, and that it cannot be extended beyond the plain meaning of those terms, it is clear that the exemption in this Act embraces only "the land of the company dedicated to the purposes of a cemetery," with the permanent improvements thereon before referred to, and does not extend to or embrace any "personal property" it may own, nor the "fund" mentioned and provided for in the ninth section. Now the answer admits that besides this real estate, the company owns investments in various stocks amounting to about \$19,000, constituting in part the fund required by the ninth section, and avers that it has no other property. These investments, as we have said, are not within the exemption. We have then a case in which the capital stock of a corporation is represented by, and its value consists in part of, non-taxable real estate, and in part of taxable personal property. It follows that the stock is taxable to the extent that this taxable element enters into, and forms part of its value, and to that extent only.

The State, therefore, having the right to tax this stock, for three years, to the extent indicated, the only other question is, how shall the order appealed from, which dismisses the petition, be disposed of? The petition sets out the assessment of the stock for each year at its par value, and the amount of the tax upon the basis of such assessment, and prays for a *mandamus* to compel payment of that sum. It is apparent from what we have said, that this amount cannot be recovered. There must be a new assessment on the principle stated, and as it is very doubt-

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Miller *vs.* Balto. County Marble Co., *et al.*

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ful whether the petition could be amended, so as to set forth such new assessment when made, it seems to us best, (without meaning to establish any precedent upon the subject,) to affirm the order, without prejudice to the right of the appellant to proceed with a new assessment, and to collect the tax thereunder by another application for a *mandamus* or otherwise. This mode of disposing of the order, in case the Court should determine that the stock was taxable to any extent, meets the views, as we understood them, of counsel on both sides expressed in the argument. It will therefore be adopted.

*Order affirmed  
without prejudice.*

(Decided 17th December, 1879.)

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JOHN M. MILLER *vs.* THE BALTIMORE COUNTY MARBLE COMPANY, and others.

*Demurrer to Bill in Equity—Multifariousness—A failure to file the Exhibits on which a prayer for Injunction is based not Waived by a Demurrer to the Bill—A general Demurrer to the Whole bill overruled where it was good only as to Part of the Bill.*

A bill was filed by the complainant claiming to be a creditor of and a shareholder in the B. C. M. Co., a corporation under the laws of this State, alleging that the corporation was insolvent, and praying that its liabilities might be ascertained, and the shareholders ratably assessed towards the payment of said indebtedness. The bill further alleged that F., being the president of said corporation and the holder of unpaid shares of its capital stock, fraudulently obtained a judgment against the company, and afterwards brought suit against W., a shareholder, and as such individually liable for

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Miller vs. Balto. County Marble Co., et al.

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the debts of the corporation, and recovered judgment against him. In addition to the prayer for general relief, the complainant prayed that F., and L., his assignee, might be restrained from enforcing the payment of said judgment. On demurrer it was **HELD** :

- 1st. That the bill was not multifarious.
- 2nd. That the bill in so far as it prayed for an injunction was fatally defective, because it alleged that the company was indebted to the complainant on a promissory note secured by mortgage, and also upon a promissory note indorsed by the company, and the complainant had failed to file as exhibits with his bill either the notes, copy of mortgage, or any other evidences of said indebtedness.
- 3rd. That this defect was not waived by the demurrer, which admitted only the truth of the facts stated in the bill, so far as they were relevant and well pleaded.
- 4th. That the defect however only applied to the *special relief prayed*, namely to the injunction to restrain the judgment of F., and did not in any manner affect the general relief to which the complainant was entitled as a creditor and shareholder of the company.
- 5th. That the demurrer being general, applying to the whole bill, and good as to a part only, should be overruled.

**APPEAL** from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before **BARTOL, C. J., MILLER, ALVEY, ROBINSON** and **IRVING, J.**

*John Henry Keene, Jr.*, for the appellant.

*Skipwith Wilmer*, for the appellees.

**ROBINSON, J.**, delivered the opinion of the Court.

This bill was filed by the appellant, claiming to be a *creditor and a shareholder* in the Baltimore County Marble Company, a corporation created under the general law of this State. It alleges that the Company is insolvent and

*Miller vs. Balto. County Marble Co., et al.*

prays that its liabilities may be ascertained, and the shareholders ratably assessed towards the payment of said indebtedness.

The bill further alleges, that Frederick Fickey, Jr., being the President of said corporation, and the holder of *unpaid* shares of its capital stock, fraudulently obtained a judgment against the Company for \$5445.75—and that afterwards he brought suit against one Charles Weber, a shareholder, and as such individually liable for the debts of the corporation, and recovered judgment against him for \$3804.89.

In addition to the prayer for general relief, the complainant prays that Fickey, and Lanahan, his assignee, may be restrained from enforcing the payment of said judgment.

To the bill a general demurrer was filed, and this appeal was taken from the order of the Court, sustaining the demurrer and dismissing the bill.

In support of the demurrer, it is urged in the first place, that the bill is *multifarious*.

It will be found upon an examination of the many cases in which this subject has been considered, that the objection to bills in equity on the ground of *multifariousness*, is confined to three classes :

1st. Where the bill embraces different persons as plaintiffs or defendants, who have no privity with each other, as in *Exeter College vs. Rowlan*, 6 *Mad.*, 294, and *Attorney-General vs. Merchant Tailors' Company*, 1 *M. & K.*, 189.

2nd. Where the same party sues or is sued in different capacities, as in *Ward vs. Duke of Northumberland*, 2 *Anst.*, 469, and

3rd. Where the defendant is sued in regard to several distinct matters, which have no connection with each other, as in *Attorney-General vs. Goldsmith Company*, 5 *Sim.*, 675.

Now it is very clear, the bill before us does not come within either of these classes. It is simply a bill by a

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Miller *vs.* Balto. County Marble Co., *et al.*

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creditor and shareholder, alleging the insolvency of the corporation, and praying that the shareholders may be assessed ratably for the payment of the debts of the company. It is true, that in addition to the prayer for general relief, the complainant seeks to restrain the execution of a judgment, which he alleges was fraudulently recovered against the corporation. But all the parties have a common interest in the subject-matters embraced in the bill—a common interest in ascertaining the liabilities of the company, including the Fickey judgment, and the amount which each shareholder is liable for contribution on account of said indebtedness. In no sense then can the bill be said to be *multifarious*.

In the next place, it is urged, that the bill is fatally defective, because the complainant has failed to file either the notes or mortgage, or other evidences of debt, upon which his claim as creditor is based. We have repeatedly held that where one seeks the intervention of a Court of equity by way of injunction, the bill upon its face must make out a strong *prima facie* case; and that the mere oath of the party as to the existence of a debt of which he holds the written evidence, and which he does not file as an exhibit, or satisfactorily account for its non-production, will not be regarded as proof of the debt. *Union Bank vs. Poultney*, 8 G. & J., 332; *Nusbaum vs. Stein*, 12 Md., 315; *Mahoney vs. Lazier*, 16 Md., 69; *Hankey vs. Abrahams*, 28 Md., 590.

In this case, the complainant alleges that the company was indebted to him on a promissory note for four thousand dollars, the payment of which was secured by a mortgage; and also upon two promissory notes, drawn by one Jeremiah Black, and endorsed by the company, amounting to \$812.54, but he fails to file as exhibits with the bill, either the notes, copy of mortgage, or any other evidences of said indebtedness. In this respect, therefore, the bill so far as it prays for an injunction is fatally defec-

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Miller vs. Balto. County Marble Co., *et al.*

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tive. Nor is this defect waived by the demurrer. It admits only the truth of the facts stated in the bill, so far as they are relevant and well pleaded. Whenever the ground of objection or defence is apparent on the face of the bill itself, either from matter contained in it, or from defect in its frame, it is well settled, that the proper mode of taking advantage of such objection is by demurrer. *Williams vs. Steward*, 3 *Meri.*, 472, 492; *Ford vs. Pering*, 1 *Ves., Jr.*, 77; *East India Compy. vs. Henchman*, 1 *Ves., Jr.*, 291; *Earle vs. Holt*, 5 *Hare*, 180.

This defect, however, applies only to the *special relief prayed*, namely to the injunction to restrain the Fickey judgment, and does not in any manner affect the general relief to which the complainant was entitled, as a creditor and shareholder of the company. Where the demurrer is general, that is, where it covers or applies to the whole bill and is good to a part only, it must be overruled. *Metcalf vs. Hervey*, 1 *Ves., Sr.*, 248; *Verplank vs. Caines*, 1 *John. Ch.*, 57; *Higginbotham vs. Bennet*, 5 *John. Ch.*, 184; *Todd vs. Gee*, 17 *Ves.*, 273; *Jones vs. Frost*, 3 *Madd.*, 8; *Attorney-Genl. vs. Brown*, 1 *Swans.*, 304.

If it be conceded then, that the complainant was not entitled upon the face of the bill to the writ of injunction against the Fickey judgment, yet being a creditor of an insolvent corporation, facts admitted by the demurrer, he was as such, entitled to the general relief prayed, and the Court erred in sustaining the demurrer to the whole bill.

The order of the Court must therefore be reversed, and the cause remanded for further proceedings.

*Order reversed, and  
cause remanded  
for further proceedings.*

(Decided 17th December, 1879.)

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## GEORGE PRESSTMAN vs. JOHN SILLJACKS.

*Landlord and Tenant—Construction of a deed purporting to be in Fee, but in fact only conveying a Leasehold estate—Notice—Estoppel—Right of Lessee, after his Landlord's title has expired, to purchase the Paramount title, and to deny the Title of his Landlord—Such purchase by him to be subject to any Equities of the Landlord—Action of Trespass for illegal Distress—Res adjudicata—Construction of Art. 51, sec. 14, of the Code, prohibiting Justices of the Peace from trying cases involving Titles to land—Measure of Damages.*

Property in the City of Baltimore was leased for the term of ninety-nine years, renewable forever. The leasehold interest became vested by mesne assignments in S. By proceedings for the sale of the real estate of S., a decree was obtained and a trustee was appointed to make the sale. This leasehold estate was included in the decree for sale, and was sold by said trustee to G. P. In the deed to G. P. it was spoken of as real estate, but by the special description of it in the deed and the references it was fully identified as this leasehold property. In the year 1852, G. P., supposing himself to be the owner of the fee, under said deed, (although in fact his estate then consisted of only seven years of unexpired leasehold with the privilege of renewal) executed a lease of the property for the term of ninety-nine years, renewable forever, and by mesne assignments the interest of his lessee became vested in J. S., who paid the rent to G. P. until the year 1877, when the term of G. P. was found to have long expired, and the reversioner's title and rights were discovered. J. S. then paid the reversioner a sum of money for arrearages of rent, and in consideration of a further sum, the fee was conveyed to him. J. S. afterwards refusing to pay the rent reserved in G. P.'s lease, the latter levied two distresses therefor. J. S. replevied the property distrained in each case before a justice of the peace. One justice decided in favor of J. S., and the other in favor of G. P. Both appealed to Baltimore City Court, where the judgment in each case was adverse to J. S. who paid the judgments and costs. In an action of trespass *q. c. f.* brought by J. S. against G. P., to recover for the entry thus made in making



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Presstman vs. Siljacks.

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the distresses, and the payments to which he was constrained, it was HELD:

- 1st. That G. P. did not take a fee in the property under the trustee's deed to him.
- 2nd. That the description of the property in that deed was such as to identify it as the leasehold property which S. had bought by deed duly recorded; and the whole title being of record all the parties in interest were affected with notice; so that however ignorant G. P. was at the time he leased the property, of the exact nature of his estate, his lease did in fact operate no further than as an assignment of the residue of his term.
- 3rd. That J. S. was not estopped from denying the title of G. P. as his landlord, that title at the time of his so denying it having expired by effluxion of time.
- 4th. That his paying to the reversioner the arrearages of rent for the whole period of his holding under G. P. after the latter's title had expired, together with the rent for the time he repudiated G. P's title, was a recognition of the reversioner's right, and equivalent to an abandonment of possession under G. P.
- 5th. That the purchase of the reversion by J. S. was in self-defence, and G. P. had no superior right over him to buy it.
- 6th. That if G. P. had any equity under his lease, and was not barred by laches as against the reversioner, to have through a Court of equity his lease renewed, J. S. took the fee subject to that equity.
- 7th. That J. S. was entitled to recover unless the judgments rendered against him in the replevin cases, growing out of the distresses, were to be regarded as adjudicating the question so as to prevent his recovery for the entry under the distress proceedings.
- 8th. That to render those decisions *res adjudicata* and as such an effective bar in a suit wherein the same matter was brought in issue, the tribunal making the decision must have jurisdiction over the whole subject-matter, and be competent to decide all the questions arising in the cause pertinent and important to the proper judgment in the premises.
- 9th. That under sec. 14, of Art. 51, of the Code, and the decisions of this Court, a justice of the peace had no power to determine whether G. P's title had or had not expired; and Baltimore City Court sitting as an appellate tribunal, though hearing the case *de*

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Presstman vs. Silljacks.

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*now*, had no more power or jurisdiction in that regard than the justice of the peace.

10th. That it made no difference, so far as this case was concerned, that it did not appear in the record of those proceedings, that this question was raised before the justices or in the Baltimore City Court.

11th. That a prayer by the plaintiff defining the measure of damages to be the amount of the judgments and costs on the distresses, was properly granted.

**APPEAL** from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*Exception.*—At the trial the plaintiff offered the two following prayers :

1. If the jury shall believe that the defendant in this cause held, by intermediate assignments, a leasehold interest, which was derived under a lease from Ann Fell, dated July 5th, 1769, to Alexander McMechen, then the legal title of the said Presstman expired at the expiration of the lease to the said McMechen, to wit, on the 5th of July, 1868, and that if the jury shall believe that the said defendant levied the distresses on the premises after the expiration of said ninety-nine years, to wit, on the 29th of December, 1877, and 27th of April, 1879, then the said plaintiff is entitled to recover the amount of the judgments and costs on the said distresses, even though the jury shall believe the plaintiff became tenant of the defendant on the 25th day of May, 1859.

2. That inasmuch as the conveyance from Charles F. Mayer, under which the defendant holds, recites that the title which the said Mayer proposed to convey was the title of John Steele; then if the jury shall find the deeds offered in evidence, tracing the title to John Steele, then the title of the said Steele is for a leasehold interest only,

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Presstman vs. Silljacks.

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which expired in 1868, and the defendant had no title under the conveyance from Mayer at the date of the distresses levied in 1877 and 1879.

And the defendant offered the eight following prayers:

1. That under the pleadings and evidence in this case, the plaintiff is not entitled to recover damages.

2. That if the jury shall find from the evidence that the plaintiff in this case took possession of the property described in plaintiff's declaration, as assignee under the lease of Geo. Presstman and wife, to John S. Stansbury, dated second day of April, 1856, he cannot recover for the distrains specified in the declaration.

3. That the plaintiff cannot recover any damages on account of any proceedings in Court, such as given in evidence and specified in the declaration.

4. That the plaintiff is not entitled to recover any sums of money which he may have paid by reason of the proceedings given in evidence in the two cases of distraint, as specified in the declaration, and that the right to issue the defendant's distrains is *res adjudicata*.

5. That the plaintiff is not entitled to recover any larger sum than will cover actual damage, and no part of the money specified in the declaration as having been paid by the plaintiff in consequence of the proceedings issued by defendant to distraint the property on the premises.

6. That there is no evidence that at the time of issuing the distrains for rent, John Silljacks, the plaintiff, had been coerced to pay any amount of money as ground-rent to any other person than George Presstman, and that he cannot recover any damages for any rent he may have voluntarily paid to George H. Williams, trustee.

7. That the deed from Charles F. Mayer, trustee, cannot be impeached in this action, and no testimony can be admitted to affect its validity.

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Presstman vs. Silljacks.

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8. That there is no evidence in this case that the plaintiff has sustained any actual damage whatever, and he cannot recover in this action.

The Court (DOBBIN, J.,) granted the prayers of the plaintiff, and the sixth and seventh prayers of the defendant, and refused his first, second, third, fourth, fifth and eighth prayers.

The defendant excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J.

*Benjamin C. Presstman and Orville Horwitz*, for the appellant.

The City Court of Baltimore City had jurisdiction to give the judgments recited in the record, and the amount of said judgments could not be recovered in an action of trespass like the present, but said judgments were a bar to the recovery of damages for an alleged illegal distress, the proceedings before the justice of the peace in the warrants of distress having been held valid by a Court of competent jurisdiction. *Revised Code, Art. 68, sec. 6; Deitrich vs. Swartz, 41 Md., 196; Randle vs. Sutton, 43 Md., 64.*

There is no evidence on the record to show that the plaintiff in the replevins before the justices of the peace or in the City Court raised any question as to the jurisdiction of said justices or of the City Court, and this Court will not, by any inference not sustained by the facts contained in the record, pronounce the said judgments invalid.

It being proved by John Silljacks, the plaintiff in the replevins, that he paid to the defendant (Presstman,) the amounts of the judgments and costs recovered by the defendant (Presstman,) in the appeal cases from said

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Presstman vs. Silljacks.

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justices in the above mentioned distraint proceedings, and offered no other oral testimony that said payments of money were voluntary payments, and could not have been recovered back either in this form of action or in any other. *Gordon vs. M. & C. C. of B.*, 5 *Gill*, 231; *M. & C. C. of B. vs. Lefferman*, 4 *Gill*, 426.

The appellant (Presstman,) having made and executed a lease to John S. Stansbury, and others, under which the appellee became assignee and took possession of the property mentioned in the record, and continued to pay the ground rent reserved for many years after the time of the alleged expiration of lease, the appellee is estopped from denying the title of the appellant to the property, and he has no right to purchase an adverse title to the lessor under whom he demises, having purchased the leasehold interest aforesaid, and having paid rent for many years, after the alleged expiration of title, and without notice of such purchase to Presstman. *Jackson vs. Harper*, 5 *Wendell*, 246; *Sharp vs. Kelly*, 5 *Denio*, 431; *Holt vs. Martin*, 51 *Penn. Rep.*, 499; *Taylor on Landlord and Tenant*, 544, 705; *Hodges vs. Shields*, 18 *Ky.*, 827; *Eister vs. Paul*, 54 *Penn. Rep.*, 196.

By the very terms of the conveyance from Williams, *et al.* to Silljacks, offered in evidence by the appellee, and which is relied on for his pretended title, the existence of the lease (in 1877,) is admitted and the existence of the ground rent affirmed; and not only so, but the actual payment thereof, with all moneys up to the date of the deed, (for more than twenty-one years,) is made part of the consideration. In the face of this deed, it does not lie in the mouth of the appellee to say that the title of the appellant expired in 1868.

As assignee of Presstman's lessee, Silljacks, (the appellee,) cannot dispute the title under which he entered into possession and enjoyed the property. *Taylor's Landlord and Tenant*, sec. 629; *Jackson vs. Hinman*, 10 *Johns.*, 292;

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 Presstman vs. Silljacks.
 

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*Bailey vs. Kilburn*, 10 *Met.*, 176; *Benedict vs. Morse*, 10 *Met.*, 223; *Hodges vs. Shields*, 18 *Ky.*, 828; *Eister vs. Paul*, 54 *Penn.*, 196.

A tenant cannot constitute himself a possessor in spite of his landlord, nor can he set up an adverse title until he restores the possession. *Jackson vs. Davis*, 5 *Cowen*, 134; *Steele vs. Koons*, 7 *Harris*, 208; *Rankin vs. Tenbrook*, 5 *Watts*, 386.

*John E. Semmes* and *Jno. H. B. Latrobe*, for the appellee.

The principle of estoppel, as affecting the relation of landlord and tenant, is only applicable to the title at the time the lease was granted, and does not in any way preclude the tenant from showing that such title has expired. *Taylor's L. & T.*, (4th Edition,) secs. 629 and 707; *Jackson vs. Rowland*, 6 *Wend.*, 666; *Benny vs. Chapman*, 6 *Pick.*, 124; *Giles vs. Ebsworth & Hays*, 10 *Md.*, 333; *Chitty on Plead.*, (6th Am. Ed.,) (Title Estoppel,) note m, p. 630; 1 *Wash. Real Prop.*, book 1, ch. 10a, sec. 8, (top page, 565;) *St. John vs. Wm. Quitzow*, 72 *Illinois*, 334; 1 *Taylor on Evidence*, sec. 102, (7th Ed.,) *Ryder vs. Mansell*, 66 *Maine*, 167; *Mountenoy vs. Collins*, 1 *Ellis & Black.*, 630; *Claridge vs. Mackenzie*, 4 *Man. & Gran.*, 143; *Lamson vs. Clarkson*, 113 *Mass.*, 348.

The principle of *res adjudicata* has been set up, and the records of judgments, obtained in the City Court on appeal from magistrates have been filed. In order that a judgment should operate as an estoppel, it is necessary that the former adjudication was had before a Court of competent jurisdiction to hear and determine the whole matter in controversy embraced in this suit; if the trial went off on a technical defect, or because the Court had no jurisdiction to decide the question, the judgment will be no bar to a future action. *Freeman on Judgments*, sec. 252; *Bigelow vs. Winder*, 1 *Gray*, 299; *Shafer vs. Stonebraker*, 4 *G. & J.*, 345; *Greenleaf on Ev.*, secs. 524, 528,

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Presstman vs. Silljacks.

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530 ; 1 *Taylor on Ev.*, p. 1438 ; *Brunner vs. Ramsburg*, 43 *Md.*, 325.

The question of title, which is the gist of the action in the present case, could not have been raised in the case decided in the City Court on an appeal from a magistrate for want of jurisdiction. *Code, Article 51, sec. 14 ; Deitrich vs. Swartz*, 41 *Md.*, 196 ; *Randle vs. Sutton*, 43 *Md.*, 64.

The appellee's second prayer relies upon the principle that the grantee under a deed is bound by the recitals in the deed under which he claims ; and as the deed from Mayer to Presstman recites that the interest conveyed to Presstman is that of John Steele, and as by reference to John Steele's title, it will appear that the same is a leasehold interest, which expired in 1868, the appellant is estopped by said recital from denying that his interest was a leasehold. *Funk vs. Newcomer*, 10 *Md.*, 301 ; *Ridgely vs. Bond and Wife*, 18 *Md.*, 433.

IRVING, J., delivered the opinion of the Court.

The appellee sued the appellant in an action of trespass, *quare clausum fregit*. The *narr.* contained several counts, but the gravamen of the action was alleged illegal distresses levied by the appellant on the appellee, whereby the appellee was made to pay certain sums of money unjustly. The appellant replied not guilty, and that he was the owner of the fee, and that he did what he did do in the exercise of his lawful rights as landlord. We learn from the record that Edward Fell, who was the owner in fee of certain real estate in Baltimore City, devised a part thereof to his son William, and gave to his wife, who was his executrix, the power of leasing the estate so devised, for the benefit of the son. Anne Fell accordingly, on the fifth day of July, 1769, by lease in due form demised the *locus in quo* to Alexander McMechen, for ninety-nine years, with the usual covenant for renewal for-

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Presstman *vs.* Silljacks.

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ever, (upon the payment of the rent reserved, and the amount stipulated as the price for renewal,) upon reasonable demand, at any time during the term created by the lease. By a series of successive assignments, this leasehold estate became the property of John Steele. By proceedings for the sale of his real estate, a decree was obtained, and Charles F. Mayer was appointed trustee. This leasehold estate was included in the decree for sale, and was sold by said trustee to the appellant. In the deed to the appellant it is spoken of as real estate, but by the special description of it in the deed and the references, it is fully identified as this leasehold property coming from Anne Fell, lessor. Clothed with the fee, as it is alleged he supposed himself to be, by this deed from Charles F. Mayer, although in fact he had but the unexpired time that remained of the lease, on the 15th of May, 1852, (when his estate consisted of only seven years of unexpired leasehold, with privilege of renewal;) the appellant executed a lease to Henry Straus and others for ninety-nine years, renewable forever. These lessees assigned to Adam Senz, and he assigned to Silljacks, the appellee.

The appellee paid the reserved rents till (1877) eighteen hundred and seventy-seven, when the appellant's term was found to have long expired, and the reversionary title and rights were discovered. The appellee then paid the reversioner the sum of three hundred and seventy-three dollars and twenty cents for arrearages of rent; and in consideration thereof, and of the additional sum of two hundred and fifty-two dollars and fifty cents, the fee was conveyed to Silljacks on the first day of February, eighteen hundred and seventy-seven.

Silljacks, afterward, having refused to pay the rents reserved in Presstman's lease, the appellant levied distresses. Silljacks replevied the property distrained, in each case, before a justice of the peace. One justice decided in favor of Silljacks, and the other in favor of



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Presstman vs. Silljacks.

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Presstman. Both appealed to Baltimore City Court, where in the decision, in each case, was adverse to Silljacks, and he paid the judgments and costs. It is for the entry thus made, in making the distresses, and the payments to which he was wrongfully constrained, that the appellee brought his action of trespass in the Superior Court of Baltimore City. He recovered and the defendant appealed. In behalf of the appellant it is urged.

First. That he had a fee in the property of which Silljacks was tenant.

Secondly. That the appellee could not deny his title, nor his right to levy the distresses.

Thirdly. That the whole matter was *res adjudicata*, by reason of the replevin suits, the appeals to the City Court, and the judgments therein in favor of the appellant.

It is very certain there is no evidence in the record by which Presstman takes a fee. His deed from Charles F. Mayer, trustee, in its recitals, does speak of it as real estate; but that does not make it so. The description of the property is such as to identify it perfectly as the leasehold property which Steele had bought from James Sterrett by deed duly recorded. The whole title was of record, and all the parties in interest were affected with notice; so that however ignorant the appellant was at the time he made the lease to Straus and others, of the exact nature of his estate, his lease to Straus and others did, in fact, operate no further, than as an assignment of the residue of his term.

As to the second point that the appellee could not dispute Presstman's title, because Presstman was his landlord, and therefore could not maintain his action of trespass, there is a material distinction to be observed. The general rule is, without doubt, that a tenant cannot dispute his landlord's title—that he is estopped by having accepted a lease. That estoppel has been long, if not always, held to be restricted to the denial of the landlord's

title at the time he made the lease, and the tenant entered under it; and both in suits for the recovery of rent, and in actions of this character, the tenant has been permitted to show, by way of defence, that the title of his landlord, which existed at the time the tenant entered under him, has expired by effluxion of time. This doctrine obtains both in England and in this country. The case of *Claridge vs. Mackenzie*, 4 *Manning & Granger*, 148, was a case very similar in its facts to this. It was a suit for trespass for two distresses, levied on the plaintiff, under which he paid the rent and costs of distress proceedings under protest, and under the instruction of the Court the plaintiff recovered. On a motion for a new trial, a rule *nisi* was granted, and the question was fully discussed and reviewed by the Court, and the verdict was not disturbed, all the Judges, four in number, concurring in opinion upon the law of the case. The tenant in that case, who was the plaintiff, had entered originally, as the appellee here did, not under the defendant, but under a sub-lessee of the defendant, and had paid the rent to Mackenzie the defendant. Discovering that the defendant's term had expired, he refused to pay the rent, and the distresses followed. TINDAL, Chief Justice, said, "it was competent for the plaintiff to show that the defendant's title had expired." He adds that "the plaintiff was in possession of the premises; and after the expiration of the defendant's interest, he continued to occupy as tenant by sufferance under the party who was entitled to the intermediate term of three-quarters of a year." The case of *Balls vs. Wes'wood*, decided by Lord ELLENBOROUGH, so earnestly relied on by the counsel for the appellant, is there considered, and is stated by Justice TINDAL, to have been afterward overruled by Lord ELLENBOROUGH himself, in *Doe dem. Lowden vs. Watson*. The same rule was adopted in England, *dem. Syburn vs. Slade*, 4 *T. R.*, 682, and is quoted by the Court in *Claridge vs. Mackenzie*. Subsequently, in the

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Presstman *vs.* Silljacks.

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case of *Mountnoy vs. Collier*, 72 *E. C. L.*, (or 1 *Ellis & Blackburn*,) which was a case for use and occupation, the same doctrine was maintained and applied. In this country the decisions are numerous wherein the tenant, under circumstances like this case presents, has been permitted to show that his landlord's title has expired, or been transferred, or defeated. In *Duff vs. Wilson*, 69 *Pa.*, 316, Judge SHARSWOOD says, "It is always competent for a tenant to set up that the title of his landlord has come to an end subsequent to the date of the lease; and that whenever the enjoyment ceases by lawful title, rent, which is the recompense of enjoyment, also ceases." In *Shields vs. Lozeau*, 34 *N. J.*, 496, by unanimous decision, the Supreme Court of New Jersey declare this to be the law. This case is strikingly analogous to the case before us. To analyze it, however, will unnecessarily extend this opinion. But it is insisted that before the tenant can avail himself of this privilege, he must solemnly and formally renounce his allegiance to his landlord, and formally attorn to some one else. TINDAL, Justice, in *Claridge vs. Mackenzie*, says, that was the opinion of Lord ELLENBOROUGH in *Balls vs. Westwood*, but that he subsequently altered it. COLERIDGE, J., in *Mountnoy vs. Collier*, says: "I think it would be hard upon a tenant, if, in order to enable him to do this, he was obliged in all cases actually to go out of possession; and that, if there is a new arrangement with the person who really has the title to hold under him, it should be equivalent to going out of possession." And in the same case, ERLE, J., in a concurring opinion, said, "the main question is whether the defendant may show that as a defence, he not having given up possession. I think it is competent for him to do so; for a tenant is liable to the person who has the real title, and may be forced to pay him, either in an action for use and occupation, or in trespass for the mesne profits." The case already cited from 34 *N. J.*, is authority to the same effect.

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Presstman vs. Silljacks.

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The facts of this case bring it within the principles thus decided. The fact that he purchased the outstanding title as he did, and when he did, which is pressed by the appellant against him, does not affect the question nor his rights in this case. The question here is, can he show the expiration of the appellant's title and right to claim rent from him, which upon the authorities cited we think he may do. He has paid to the reversioner the arrearages of rent for the whole period of his holding under Presstman, after Presstman's title expired, together with the rent for the time he repudiated Presstman's title. This certainly was a recognition of the reversioner's right, and equivalent to an abandonment of possession under Presstman. For an additional consideration he takes the conveyance of the reversioner's title. Ordinarily, fidelity to the landlord does inhibit the purchase of the outstanding title as against the landlord. There is no collision of authority on this question, where the tenancy under a rightful landlord exists or continues. It is the taking of secret advantage of the landlord that the law forbids. It is the using of his possession and information as tenant, behind the back of his landlord, and to the prejudice of his landlord, which the law discountenances. In 18 *Kentucky Reports*, 831, in the case of *Hodges vs. Shields*, the Court says: "We suppose that no case can be found in which it has been held that the acquisition of title by a tenant for years, by a fair purchase of the land after the execution of the lease under which he took possession, was a breach of his fidelity to his landlord, or that such title enured to the benefit of the latter. The tenant in such case, cannot be regarded as holding the title in trust for his landlord, especially in a case like the present, where it is shown the landlord had no title at all." In this case the title of the appellant had expired many years before the appellee discovered it, we may reasonably suppose, or he would not have subjected himself to the payment of

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Presstman vs. Silljacks.

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double rent. In self-defence, he buys the reversion, which Presstman had no superior right over him to buy. The appellant had a covenant for the renewal of his lease on specified terms, at any time during the term, on demand; but he had not exercised his privilege so as to continue his rights over the appellee as his tenant. If he had any equity under his lease, and was not barred by laches, as against the reversioner, to have through a Court of equity his lease renewed, Silljacks took the fee, subject to that equity; but in this case we cannot settle that question, nor regard such equity, if it exist. We can only deal with the legal rights and status of the parties. This being our view of the law on the questions discussed, the appellee was entitled to recover, unless the judgments rendered against him in the replevin cases growing out of the distresses, are to be regarded as adjudicating the question, so as to prevent recovery, because of the entry under the distress proceedings. This was not pleaded formally, but has been relied on as a necessary consequence of the evidence introduced by the appellee to sustain his case. It is relied on both as an absolute bar, and as an objection to the rule of damages laid down by the Court in the instruction to the jury. As has already been stated, upon the distresses being levied, the appellee replevied before justices of the peace, one of whom decided for the appellant, and the other for the appellee. On the appeal, the City Court decided both cases adversely to the appellee in this Court, who was compelled to pay, and did pay the judgments and costs. It is settled law, that to render these decisions *res adjudicata*, and as such an effective bar in a suit wherein the same matter is brought into issue, the tribunal making the decision, must have jurisdiction over the whole subject-matter, and be competent to decide all the questions arising in the cause pertinent and important to the proper judgment in the premises. Under the 14th sec. of Art.

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Presstman vs. Silljacks.

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51, of the Code of Public General Laws, a justice of the peace is not competent to hear and decide any case wherein the title to land is involved. Under that section and the decisions of this Court thereon, the justice of the peace had no power to determine whether Presstman's title had, or had not expired; and Baltimore City Court, sitting as an appellate tribunal, though hearing the case *de novo*, had no more power or jurisdiction, in that regard, than the justice of the peace.

This being so, the justices of the peace, nor the City Court could in those proceedings, give the appellee the benefit of his defence against the appellant, that the appellant's title had expired, and with it his right to demand rent.

It does not make any difference so far as this question is concerned, that it does not appear in the record of those proceedings which have been offered in evidence, that this question was raised before the justice or in the City Court. It is enough for the purposes of this decision, that the law of which we must take judicial cognizance, limited the jurisdiction of those tribunals, and prevented inquiry into the title of land, however it might arise. Testing the instructions granted, and the prayers refused, to the granting and refusal of which respectively exception was taken, by the principles of law we have found applicable, we find no error in the rulings of the Superior Court. The objections to the plaintiff's first prayer, made in this Court, that it assumes as a matter of fact, that Presstman had no other title than that which he obtained by deed from Charles F. Mayer, and also put to the jury the determination of a question of law, that is, required the jury to find whether the defendant held a leasehold estate, and that the evidence was insufficient to sustain the prayer, cannot be considered in this Court under its rules, as it does not appear by the record that such infirmities were complained of in the Court below, and excepted to for that reason.

The appellant's objection to the measure of damages established by granting the plaintiff's first prayer, cannot be sustained. He was certainly not damnified by that mode of stating the damages which the plaintiff was entitled to recover. The plaintiff was entitled to recover for all the injury directly produced by the unlawful entry and conduct of the defendant. *Ridgely vs. Bond and Wife*, 17 Md., 14. In this case the declaration charges the breaking and entering of plaintiff's close; and by other counts sets out the specific acts which were committed, and alleges the taking and keeping of his goods, until replevin secured the possession again, but which suits he finally lost, and was compelled to pay the money claimed for rent and costs of suit. This suit, therefore, may be regarded as a suit for the wrongful entry on the land, and also for *de bonis asportatis*. If this were an action of trover, the measure of damages would be the value of the goods with interest. Here the goods were taken, and in consequence of it, in order to regain possession, the plaintiff was compelled to pay rent illegally, and the cost of the distresses, which but for the distresses he would not have had to pay. Having become his own avenger for a claim, which the law did not justify him in making, and which if it had arisen in another forum could have been successfully resisted, but could not be defended fully because of the prohibition of the inquiry before a justice of the peace, or the appellate Court to which the case went from the justices, he must be answerable for the necessary consequences of his act. He cannot complain that the rule of damages has been thus restricted.

The second instruction for the plaintiff simply states the legal effect of certain title papers offered in evidence, if the jury should find the same, and was properly granted.

In the rejection of the first six prayers of the defendant below, the Court committed no error. Under the law as

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Gill and McMahon *vs.* Vogler.

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we have laid it down, none of them should have been granted. The judgment will be affirmed.

*Judgment affirmed  
with costs.*

(Decided 18th December, 1879.)

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ANSLEY GILL AND JAMES MCMAHON, Partners, trading as GILL & MCMAHON *vs.* HENRY VOGLER.

*Executory contract—Condition precedent—Wilful abandonment of Contract after part Performance—Recovery under a Quantum Meruit disallowed—Right of a party to a Contract, not in default, to employ others to complete the Work left Unfinished by the other party who wilfully Abandoned the Contract.*

V. contracted in writing with G. and M. to do certain work in the improvement of Jones' Falls, for five thousand dollars. The work was to be done in accordance with certain plans and specifications adopted by the authorities of Baltimore City, and to the satisfaction of the City Commissioner. It was also agreed between the parties that the City Commissioner should make monthly estimates during the progress of the work, and upon the estimates thus made G. and M. were to pay V. eighty per cent. of the contract price, the remaining twenty per cent. to be paid on the completion of the whole work. V. having performed a part of the work, notified G. and M. in writing, that unless payment was paid by a day specified, for what had been already done, he would abandon the work. No monthly estimates were made by the City Commissioner during the progress of the work, because in his judgment, the work had not been performed in accordance with the plans and specifications, and G. and M., therefore, refused to make any payments. V. thereupon abandoned the work and sought employment with other persons. Subsequently upon being notified by G. and M. that they had made a contract with other parties for the completion of the



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Gill and McMahon vs. Vogler.

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work begun by him, V. offered to resume the work. This offer G and M. refused; V. thereupon sought to recover under a *quantum meruit* for the work done by him. **Held:**

- 1st. That the monthly estimates to be made by the City Commissioner, were by the very terms of the contract, a condition precedent to the right of V. to demand payment during the progress of the work.
- 2nd. That V. was not justified in refusing to perform the contract, upon the refusal of G. and M. to accede to his demand for payment for the work actually done.
- 3rd. That V. having, voluntarily and without excuse, abandoned the work, could not recover for the work done by him in part-performance of the contract.
- 4th. That G. and M. being obliged by their contract with the City authorities to complete the entire work, by a given time, had a perfect right, upon the voluntary abandonment by V. of his contract, to employ others to finish the work begun by him.

**APPEAL from the Baltimore City Court.**

This action was brought by the appellee to recover of the appellants for certain work done, under a written contract, on the line of Jones' Falls between Pratt Street and Canton Avenue in the City of Baltimore. Sundry exceptions were taken by the defendants during the progress of the trial. The case is further stated in the opinion of the Court. The jury rendered a verdict in favor of the plaintiffs for \$1403.91, and judgment was entered on the verdict. The defendants appealed.

The cause was argued before BARTOL, C. J., ALVEY, ROBINSON and IRVING, J., for the appellants, and submitted for the appellee.

*J. Henry Duvall* and *John Henry Keene, Jr.*, for the appellants.

*William H. Cowan*, for the appellee.

ROBINSON, J., delivered the opinion of the Court.

The undisputed facts of this case are simply these: In January, 1875, the appellants made a contract with the authorities of Baltimore City for the improvement of Jones' Falls, the work to be done to the satisfaction of the City Commissioner, in strict accordance with the plans and specifications on file in his office, and to be completed by the first day of July following.

In March of the same year, the appellee contracted in writing with the appellants to do a *certain portion* of the work for five thousand dollars, the whole work to be done in accordance with the plans and specifications adopted by the authorities of Baltimore City, and to the satisfaction of the City Commissioner. It was further agreed between the parties, that the City Commissioner should make monthly estimates during the progress of the work; and upon the estimates thus made, the appellants were to pay Vogler *eighty per cent.*, the remaining twenty per cent. to be paid on the completion of the whole work.

Under this contract Vogler began the work, and prosecuted it from time to time until the 30th of June, when he notified the appellants in writing, that unless payment was made by the 2nd of July for the work already done, he would abandon the work. No monthly estimates were made by the City Commissioner, during the progress of the work, because in his judgment, the work had not been performed in accordance with the plans and specifications, and the appellants therefore refused to make any payments. Thereupon the appellee, Vogler, removed the machinery used by him in prosecuting the work, and sought employment with other persons. Afterwards, namely on the 9th of July, the appellants made a contract with *Flaherty & Welsh* for the completion of the work thus begun by the appellee; and upon being notified of this contract, the latter offered to resume the work, but this offer was refused by the appellants.

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Gill and McMahon vs. Vogler.

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The evidence further shows that the appellants during the progress of the work, urged the appellee from time to time to put it in such a shape as would justify the City Commissioner in making the monthly estimates, according to the terms of the contract, but this he failed to do.

The appellee now seeks to recover under a *quantum meruit* for the work done by him.

Whatever difficulty there may be in reconciling the many decisions in regard to the right of action by one under a special contract, part of which remains unperformed, they all agree in holding, that where there is an executory contract, and the plaintiff has performed part of it, and then wilfully and without legal excuse refuses to perform the rest of it, he cannot recover either in *general* or *special assumpsit*. *Denmead vs. Coburn*, 15 Md., 44; *Faxon vs. Mansfield & Holbrook*, 2 Mass., 147; *Stark vs. Parker*, 2 Pickering, 267. See also cases cited in 2 *Smith's Leading Cases*, in notes to *Cutter vs. Powell*.

Here then is an executory contract for the performance of certain work, in consideration of which the appellants were to pay five thousand dollars; and the question resolves itself into this, has the appellee after part-performance of the contract, wilfully and without just excuse refused to perform the rest of it? And to this there can be but one answer.

Under the contract the work was to be done in accordance with certain plans and specifications, and to the satisfaction of the City Commissioner; and during the progress of the work the appellants were to pay to the appellee eighty per cent. upon *monthly estimates to be made by the City Commissioner*. These monthly estimates were by the very terms of the contract, a condition precedent to the right of the appellee to demand payment during the progress of the work. It is not pretended that the Commissioner acted in bad faith in refusing to make the estimates, or that there was any collusion between him

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Gill and McMahon *vs.* Vogler.

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and the appellants. The appellee had no right then to demand payment of the eighty per cent. nor any right to refuse to perform the contract, because the appellants refused to accede to this demand. Here then is a case in which the appellee voluntarily and without any excuse abandoned the work, and it is clear according to all the authorities he cannot recover under a *quantum meruit* for the work done by him in part-performance of the contract. By their contract with the City authorities the appellants were obliged to complete the entire work by a given time; and when the appellee voluntarily abandoned his contract, they had a perfect right to employ others to finish the work begun by him. If the appellee is to be permitted to maintain an action under the circumstances of this case, then contracts would be without force or meaning between parties. *Denmead vs. Coburn*, 15 *Md.*, 44; *Rodemer vs. Hazlehurst & Co.*, 9 *Gill*, 294.

It follows from what we have said, that the several instructions granted by the Court were erroneous, and being of opinion that the plaintiff was not entitled to recover under the evidence, we shall reverse the judgment without remanding the case for a new trial.

*Judgment reversed,*  
*without remanding*  
*the case for a new trial.*

(Decided 18th December, 1879.)

MARY CLARE JOHNSON and WILLIAM N. BALLARD  
JOHNSON *vs.* ALEXANDER T. JOHNSON, and others.

*Section 58 of Article 16 of the Code—Act of 1870, ch. 450,  
not Retrospective in its operation.*

Section 58 of Article 16 of the Code, before it was amended by the Act of 1870, ch. 450, provided that: "Whenever lands lie partly in one county and partly in another, or partly in a county, and partly in the City of Baltimore, or whenever persons, proper to be made defendants to proceedings in chancery, reside some in one county, and some in another, or some in a county, and some in the City of Baltimore, that Court shall have jurisdiction in which proceedings shall have been first commenced." A bill was filed in the Circuit Court of Baltimore City, where the defendants resided, alleging that certain land situated entirely in Baltimore County, could not be divided without loss to the parties interested, and praying for a sale of the same, and for a division of the proceeds arising therefrom. A decree was passed on the 19th of June, 1866, directing the sale of the land, and appointing trustees to make the sale. The land was sold and the sale reported to the Court; but the sale was afterwards set aside for cause. Before any further effort to sell was made, the Act of 1870, ch. 450, amending sec. 58 of Art. 16 of the Code, was passed. By this Act two provisos were added to the section. The first was as follows: "*provided*, that all proceedings for any partition of real estate, to foreclose mortgages on land, or to sell lands under a mortgage, or to enforce any charge or lien on the same, shall be instituted in the Court of the County or the City of Baltimore where such lands lie, or if the lands lie partly in one county and partly in another, or partly in one county and partly in the City of Baltimore, then such proceedings may be commenced in either county or in the City of Baltimore; but no sale or partition of lands under any such proceedings shall take place after the passage of this Act, except under the decree of a Court, as hereinbefore provided." It was insisted by two of the defendants that the last clause of this proviso, divested the jurisdiction of the Court which passed the decree, and rendered it inoperative and void. **HELD:**

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Johnson *vs.* Johnson, *et al.*

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That the Act of 1870, ch. 450, was intended to be, and was prospective in its operation only; and could not be held to affect the rights of parties under a decree which went into effect before it was passed, or the powers of the Court to enforce such decree.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was submitted to BATTOL, C. J., BOWIE, ALVEY, ROBINSON and IRVING, J.

*Wm. Shepard Bryan*, for the appellants.

*Thomas Hughes*, for the appellees.

IRVING, J., delivered the opinion of the Court.

The sole question presented by this appeal, is whether the Act of 1870, chapter 450, which repeals and re-enacts secs. 58 and 60 of Art. 16 of the Code of Public General Laws has the effect to prevent the enforcement of a decree of the Circuit Court of Baltimore City, passed before the passage of the Act, in a case pending in said Court, and renders a new proceeding, *ab initio*, in the Circuit Court for Baltimore County, necessary to secure the sale which has already been decreed by the decree of the Circuit Court of Baltimore City. The record discloses that Elizabeth Johnson of Baltimore City died, leaving a will, whereby a tract of land lying in Baltimore County, was devised in equal proportions to her children, who resided in said city.

A bill was filed in the Circuit Court of Baltimore City, where the defendants resided, alleging the indivisible character of the land, and praying for a sale for the purpose of partition. All the parties were brought in, and the case proceeded by regular stages to a decree which

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*Johnson vs. Johnson, et al.*

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was passed on the nineteenth day of June, eighteen hundred and sixty-six. The decree directed the sale of the land and appointed trustees to make the sale.

After sundry ineffectual efforts to sell, the trustees finally did sell and reported the sale to the Court, but this sale was set aside for cause. Before any further effort to sell was made, this Act of 1870 was passed. Two of the parties defendants, on the 28th day of February, 1879, filed a petition in the Circuit Court of Baltimore City asking for a rescission of said decree, which petition having been dismissed this appeal has been taken.

The 58th sec. of Art. 16 of the Code, before amendment by this Act, provided that "Whenever lands lie partly in one county and partly in another, or partly in a county, and partly in the City of Baltimore, or whenever persons proper to be made defendants to proceedings in chancery, reside some in one county, and some in another; or some in a county, and some in the City of Baltimore, that Court shall have jurisdiction, in which proceedings shall have been first commenced." In this case, the land was situated entirely in Baltimore County, and the parties defendants resided in Baltimore City. To this section the Act of 1870, ch. 450, adds two provisoes, the first of which gives rise to this controversy. It reads thus: "provided, that all proceedings for any partition of real estate, to foreclose mortgages on land, or to sell land under a mortgage, or to enforce any charge or lien on the same, shall be instituted in the Court of the county, or City of Baltimore, where such lands lie, or if the lands lie partly in one county, and partly in another, or partly in one county, and partly in the City of Baltimore, then such proceedings may be commenced in either county or in the City of Baltimore; but no sale or partition of lands under such proceedings, shall take place after the passage of this Act, except under the decree of a Court, as hereinbefore provided." The last clause of this

proviso, the appellants insist divests the jurisdiction of the Court which passed the decree, and makes it inoperative and void. In numerous cases, this Court has held that statutes should not be given a retroactive operation, unless such a construction is unavoidable from the language used. In *Williams' Adm'x vs. Johnson's Adm'x*, 30 Md., 508, this Court said: "A statute ought not to have a retroactive operation, unless its words are so clear and imperative, that no other meaning can be annexed to them, or unless the intention of the Legislature could not be otherwise satisfied; and especially ought this rule to be adhered to when such a construction would alter the pre-existing situation of parties, or would affect or interfere with their antecedent rights." In *New Central Coal Co. vs. George's Creek Coal and Iron Co.*, 37 Md., 557, it is said that this rule is "founded in the most obvious principles of justice;" that a law shall be taken to have a prospective operation, and never a retroactive effect, "unless there is something on the face of the enactment, putting it beyond doubt that the Legislature meant it to operate retrospectively." In *Herbert & Hairston vs. Gray*, 38 Md., 529, the same principles are declared and applied. In this last case the Legislature enacted that a married woman might be sued at law "on any note, bill of exchange, single bill, bond, contract or agreement which she *may have executed* jointly with her husband." Notwithstanding the past tense ("may have executed") was used, this Court held as the Legislature did not say "may have executed before the passage hereof," or "may have *heretofore* executed," the presumption was that the Legislature did not intend to affect contracts not made with reference to and after the statute was passed. In the Act under consideration, the Legislature has not said in terms, that decrees already passed shall be inoperative after its passage, and in view of the serious inconvenience which such a construction would produce, and the change in the



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Johnson *vs.* Johnson, *et al.*

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situation and rights of the parties, we cannot suppose the Legislature intended it to have such an effect as is claimed for it. A decree has been passed by a Court of competent jurisdiction at the time of the institution of proceedings, and which had full jurisdiction up to and including the time when the decree was passed. That decree adjudicates that the property in question was indivisible; that it was necessary for it to be sold for the purpose of partition; trustees have been appointed to make the sale; the decree secures to the complainant the right to have the costs paid from the property. If the law be accorded the effect which the appellants claim for it, it would change the whole status of the matter and the situation of the parties. By a new proceeding in another jurisdiction, on account of the change of circumstances since the decree, the present decree may be reversed, and great hindrance, delay and expense would result to the parties. Conceding the power of the Legislature to pass a law having such effect, upon which we express no opinion, we do not think the law necessarily requires such a construction, or is susceptible of no other. We must hold that it was intended to be, and is, prospective only in its operation; and in so far as decrees, passed before it went into effect, settling the rights of the parties, are concerned, it cannot be held as affecting them or the powers of the Court passing them to enforce them.

The order dismissing the petition will be affirmed with costs.

*Order affirmed with costs.*

(Decided 18th December, 1879.)

HENRY S. DAVIS *vs.* RICHARD M. HALL.

*Contract for the Sale of Land where the Purchase money is payable in Instalments—Part payment of the Purchase money—Rescission of the Contract—Rights as between Vendor and Vendee—Liability of the Grantee in a Deed, absolute in form, but intended as a Mortgage, for Taxes on the property—Practice in Equity in respect of Remanding a Commission to take testimony.*

Under a contract for the sale of lands where the purchase money is payable in instalments, if the vendee pays part and then rescinds the contract, he cannot recover back what he has paid, the vendor being ready and willing to perform on his part.

But if the vendor be the party who rescinds the contract, he cannot hold on to any part of the consideration he has received under it, and what has been paid may be recovered by the vendee.

Where the contract itself provides what *shall be done* with the land in case the vendee fails to pay the instalments, the vendor cannot treat his failure to pay as a total rescission of the contract by the vendee.

In such case both parties are bound by its terms, and any rights which the contract gives to the vendee in the proceeds of the sale to be made by the vendor upon the vendee's failure to pay, are still reserved to the latter.

A grantee in a deed, absolute in form, though in fact intended as a mortgage, is, in the absence of any agreement to the contrary, liable as between himself and the grantor, to pay the taxes on the property accruing after the date of the deed.

A commission had been returned at the instance of the complainant, and after he had full opportunity to take his testimony. More than eight months thereafter, and after the case was ready for hearing, he applied to have the commission remanded to enable him to take further testimony. **HELD :**

That there was no error in refusing this application ; there is no rule of equity practice that will justify the remanding of the commission under such circumstances.

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Davis vs. Hall.

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APPEAL from the Circuit Court for Prince George's County, in Equity.

The cause is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER and IRVING, J.

*Henry E. Davis* and *C. C. Magruder*, for the appellant.

*William A. Meloy*, for the appellee.

MILLER, J., delivered the opinion of the Court.

It is conceded that the absolute deed of the 20th of October, 1873, by which Eben C. Ingersoll and wife conveyed the farm in Prince George's County to Davis, was intended and is to be treated as a mortgage from Hall to Davis. The bill filed by Davis alleges that Hall had purchased the land from Ingersoll, and had paid the whole of the purchase money therefor, but being indebted to Davis in the sum of \$10,500, according to the terms of a certain agreement which had been executed between them in Washington City, he authorized and directed Ingersoll to convey the land to Davis in order to secure the payment of that debt. The prayer of the bill is that the deed may be decreed to be a mortgage, and the property sold for the payment of this debt, which is charged to be still due and unpaid. The agreement referred to in the bill as the foundation of the indebtedness of Hall to Davis was a certain contract between Davis of the first part and Hall and one Charles H. Holden of the second part, dated the 1st of March, 1873, the terms of which will be presently stated. When the deed from Ingersoll was executed, two instalments of \$5000 each with interest had become due to Davis under this contract. One of the defences which

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Davis vs. Hall.

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Hall sets up in his answer is, that the deed was executed solely upon the consideration that Davis would allow a postponement of the payment of one of these instalments, and that that instalment with all its incidents has been since fully paid and discharged. But the proof in the case, which we have carefully examined, fails to sustain this position. We think it is very clear that the deed was given as part security for all that was due to Davis under the contract at the time the deed was executed. In the view we have taken of the case it is not necessary to ascertain the exact amount of this indebtedness.

The other and main defence is, that after the execution of the deed thus given as collateral security, Davis himself made breach of the conditions of the contract on his part to be kept and performed, and altogether rescinded the same, refused to abide by it, and held it to be wholly null and void, and that he thereby released the collateral security of the deed, and thenceforth held and continues to hold the title of the land so conveyed to him free from all charge, and in trust to convey the same to Hall. This defence was sustained by the Court below, and a decree was passed in conformity with a prayer to that effect contained in the amended answer of the defendant, directing Davis to release and convey the land to Hall within a certain time, and in case of his neglect or refusal to do so, then that the decree itself shall stand as a release and conveyance thereof, and the title to the land shall be divested from Davis and vested in Hall, as fully as if the deed from Ingersoll and wife had been originally executed and delivered to Hall as the sole grantee therein. From that decree the present appeal is taken.

In reviewing this decree we must first consider the contract of the 1st of March, 1873, and ascertain whether the appellant had in fact abrogated or rescinded it, or had refused to be bound by its terms and conditions. It appears that Davis was the owner of about thirty-six acres

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Davis vs. Hall.

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of land near the City of Washington which he desired to sell, and which Hall and Holden proposed to purchase. After some negotiations between them the land was surveyed, subdivided into blocks and lots for building purposes, with streets properly located, and a plat was made showing the location and subdivision of the property. The parties then entered into the contract in question under their hands and seals, the terms of which are substantially these:

1st. Davis agrees in consideration of the sum of \$55,000 to be paid to him by Hall and Holden as follows, viz., \$5000 with seven per cent. interest, on or before the 1st of June next, \$5000 with like interest on or before the 1st of September next, and the remainder with like interest in six equal annual instalments, counting from the date of the contract, and on and after the performance and observance by them of the agreements and conditions hereinafter mentioned, to sell and convey this property to Hall and Holden in fee simple.

2nd. Davis further agrees at any time within six months after the date of this contract, to convey to Hall and Holden or their assigns, at their request and expense, any one or more of the lots in blocks Nos. 11, 12 and 13 in the plan of the property, upon and after the payment to him of \$100 for each lot sold, and after the work of building *four* of the dwelling houses or cottages hereinafter mentioned, shall have been commenced.

3rd. It is then expressly agreed and provided that no deed or conveyance of the whole or remaining portion of the land or lots shall be given or demanded until after the sum of \$15,000 shall have been paid to Davis, and until after the erection and completion of eighteen dwelling houses or cottages, each of the value of \$1800, upon the lots in blocks 11, 12 and 13; and that upon the payment of said sum and the completion of said houses or cottages, Davis shall and will convey the whole or remain-

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Davis vs. Hall.

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ing portion of the lands to Hall and Holden, upon his receiving at the same time a deed of trust thereof securing the unpaid purchase money.

4th. It is further agreed that Hall and Holden shall pay all the taxes on the land, and if they fail to do so and Davis shall pay the same, the amount thereof shall be considered as part of the purchase money, bear like interest, and be secured in like manner as a charge or lien on the land.

5th. "And it is hereby further agreed and expressly provided, that if at any time before the execution and delivery of the deed or conveyance of the whole or the remaining portion of said land, any default shall be made in any of the payments aforesaid of said purchase money, or any part of the said interest, as hereinbefore provided, then and thereafter it *shall be lawful and right* for the said Davis, his heirs or assigns, *to sell the said land or the remaining portion thereof, upon such terms, and after such public notice customary in public sales of real estate*, and to convey to the purchaser thereof in fee simple; and of the proceeds thereof, after paying all expenses of sale and retaining a reasonable commission for the same, to pay all of said payments then unpaid, with the interest thereon, whether due or not, and all amount, if any, paid for taxes as aforesaid, with the interest thereon, *to pay the remainder, if any, to said Hall and Holden, their heirs or assigns.*"

6th. And Hall and Holden agree to make said payments with interest, at the times hereinbefore provided for the payments thereof, and that they will erect and complete said houses or cottages as hereinbefore provided, within six months from the date hereof, and that they will observe and perform all the provisions and conditions herein expressed.

It is manifest from an examination of this agreement, (which seems to have been very carefully prepared,) that

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Davis *vs.* Hall.

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the parties intended, and that the contract itself provides, that a small portion of these lots should be sold by the vendees, and the title to them pass from the vendor, before a conveyance of the rest of the property should be made or demanded. The evident purpose of this was to develop the property at once, and bring the rest of it to the favorable notice of purchasers, and thus enhance its value as well as secure its improvement and sale. It is also very important to notice the fact that it provides in explicit and carefully guarded terms, what rights the vendor shall have, and what course he shall pursue in case of *any default* on the part of the vendees in payment of the purchase money according to its stipulations. It contemplates the contingency of such default, and carefully provides what shall be done, and what rights shall thereupon arise and accrue to each party. With this understanding of its purpose and provisions, we must inquire what was done under it, and which party is, in law, to be regarded as the one that has rescinded it, or refused to abide by its terms. This must be ascertained and determined solely from the evidence contained in the record before us. The testimony is very voluminous, is confused in its arrangement, and on some points is conflicting. We have given it a patient and careful examination, and without reviewing it in detail, we shall simply state in general terms such facts material to the questions to be decided as, in our judgment, it establishes.

We find then, that after the date of this contract, a few of the lots were sold by the vendees, and deeds therefor were given to the purchasers by Davis, and that in some cases he received the \$100 on such sales. It is clear, however, that Hall and Holden failed to pay the instalments due on the first of June, and the first of September. Davis then pressed for payment, and on the 20th of September, notified them by letter, that unless they paid on or before the 1st of November following, all arrears

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Davis vs. Hall.

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then due, "the said agreement will be held *by me* as null and void, and I consequently discharged from *any obligation* thereunder," and that from the date of the letter, he would give no further deeds. To this, Hall replied by letter of the 29th of September, in which he proposes the Prince George's farm as security, which he says cost him \$10,000, and Holden, by a letter of the 30th of September, proposes to settle by the assignment of various collaterals, being chiefly amounts alleged to be due by parties to whom sales of lots had been negotiated. The deed of the Prince George's land was then executed on the 20th of October, 1873, for the purpose we have before stated. After this, some other collaterals were passed to Davis by Hall and Holden, but were not received by the former as absolute payment for their face value, but to be collected by him, and the proceeds applied to the indebtedness under the contract. Upon these some money was eventually realized by Davis, but very little in comparison with what was then due him. Hall and Holden then endeavored to, and did in fact, effect the organization of an *unincorporated* Association, called the "Cottage Hill Company," for the purpose of purchasing this property, and negotiations with Davis were had for the purpose of effecting a settlement on the basis of a purchase by this Association. In a letter to him of the 28th of February, 1874, their inability to meet the payments under the contract is plainly admitted, and they request an extension of time, and that he would if possible accede to the terms of purchase proposed by this Company, of which he was aware. But the proposed sale to this unincorporated Association was never assented to by Davis, and on the 1st of March, 1874, when the first *annual* instalment provided for in the contract became due, he addressed a written notice to Hall and Holden, to the effect that unless they complied with the contract, and made the payments then due under it, he would treat the contract from the



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Davis vs. Hall.

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9th of that month as *null and void*, and would have nothing further to do with them in the matter of that contract. The original notice seems to have been lost, but its contents are clearly proved, and Davis himself, in his testimony, admits that he sent such a notice to them. Afterwards, on the 3rd of April, 1874, a Company by the name of the "Cottage Hill Company," was duly incorporated. With this Company, Davis, in total disregard of the terms of his contract with Hall and Holden, as to his power to sell, negotiated a *private sale* of the property in question, and on the 9th of April, 1874, entered into a written contract by which he agreed to sell to them his "*remaining title and interest*" in the property for the sum of \$62,200, to be paid in the manner therein specified. The preponderance of evidence clearly shows that while Hall and Holden were interested in, and the former was an officer of, the previous unincorporated Association of the same name, they were neither corporators, officers, stockholders, nor in any way interested in the subsequently incorporated Company. In the contract with this corporation, no mention is made of the previous contract with Hall and Holden, and there is no acknowledgment of any rights of theirs under it, nor does it profess that the sale which it effects was made in pursuance of any power of sale contained in, or provided for by the first contract. On the contrary, it contains a stipulation that the vendee corporation shall not be held responsible in any mode or manner, for any liabilities that may have accrued by reason of parties having any claims or alleged claims against Davis or the property referred to, and Davis covenants and agrees with the corporation to save it harmless from any demand whatever of such claimants or alleged claimants. It also contains an agreement giving permission to Davis to subscribe for ten shares of the stock of the Company to be credited on the purchase money. It has been contended that this sale was made at

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Davis vs. Hall.

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the instance and with the assent of Hall and Holden, and Davis so testifies in this case. But in this we think he is mistaken. He is not only contradicted by the testimony both of Hall and Holden, but in May, 1874, just after this sale was made, they filed a bill against him in the Supreme Court of the District of Columbia, in which they set up their rights under the original contract, and charge, among other things, that after they had found a purchaser for the property at a highly advantageous price, Davis intervened and sold the property to this corporation, by which sale they aver, that he, *at their election*, became their trustee, and liable to account with them for the proceeds of such sale. In his sworn answer to this bill, Davis admits the sale, and avers that after they had notified him of their inability to meet the payments under their contract, his only safe course was to *rescind it*, and make sale of the premises to the best advantage he could. After testimony had been taken, the equity Court passed a decree dismissing the bill with costs, and on appeal that decree was affirmed without prejudice.

It seems to us therefore, plain from the facts thus found, that the vendor is the party who must be regarded as having rescinded this contract and refused to abide by its terms and conditions. True, default was made by the vendees in payment of the instalments of purchase money as they became due, and if the contract had been silent as to what should then be done by the vendor, and what rights should then accrue to each party, it may be that he could have treated such default as a rescission by them, and have sold the property as he afterwards did, and still have held on to the money or securities he had received from the vendees under it. The appellant's counsel have cited the cases of *Ketchum & Sweet vs. Evertson*, 13 Johns., 359, and *Battle vs. The Rochester City Bank*, 5 Barb., 414, as sustaining his right to hold on to and enforce this mortgage. But those cases are widely different from the one

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Davis vs. Hall.

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before us. In the former there was simply a contract for the sale of land, the purchase money to be paid in instalments. The vendee paid the first instalment, and then refused to complete the contract and left the premises. The vendor afterwards sold the property to another party, and the vendee then brought *assumpsit* to recover back what he had paid. The Court held that a party who has advanced money or done an act in part-performance of an agreement, and then stops and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. "The plaintiffs," say the Court, "are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus *have themselves rescinded the contract*. It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received." The latter case was of like character, save that the contract provided that on failure to pay the instalments it should become void if the vendor should elect to rescind it. The Court held that this clause merely expressed what the law would have adjudged without it, and denied the right to recover, for the reasons stated in the preceding case. In neither of these cases was there any clause in the contract reserving any right or interest to the vendee in case of his default, and the decisions rest entirely upon the ground that it was by his fault that the rescission took place, or in other words, that he in fact was the party who had rescinded. But in the present case, as we have seen, the contract provides what rights each party shall have in case of default by the vendees. All rights and inte-

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Davis vs. Hall.

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rests, of the latter are not stricken down by their default in paying the instalments of the purchase money. On the contrary, in that event it is by this agreement only made lawful and right for the vendor to sell the property after public notice, and then he is bound to apply the proceeds first to the payment of what is due him, and the balance if any to the vendees. They have thus secured to them an interest in the sale and in the application of the proceeds. The sale made by the vendor has been made in violation of the terms of this stipulation, and he has denied and repudiated its obligation. He is therefore the party who has rescinded the contract, and standing in this attitude, it would be against equity and conscience to allow him to hold on to this mortgage security. The case clearly falls within the general rule that a party cannot rescind a contract and at the same time hold on to the consideration in whole or in part which he has received under it.

The appellant then not being entitled to hold on to this land as security for the overdue instalments of purchase money, (the sole purpose for which the deed conveying it was executed,) does the record show that he has any other equitable interest therein? It is insisted first, that he should be allowed to retain the farm until he has been reimbursed the amounts he paid for examining the title and for taxes since the date of the deed. But it is clear, we think, that Hall made no contract and was under no obligation to pay either of these charges. The examination of the title was evidently made at the instance of Davis himself, and consequently at his own cost, and the deed being absolute on its face the legal obligation to pay the taxes rested on him. Besides this, the form of the deed gave him the right of possession, and the right to receive the rents and profits of the land if he chose to exercise it. Another alleged equity arises in this way. Though the bill charges that Hall had paid the whole purchase money

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Davis vs. Hall.

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due Ingersoll for this farm, yet the testimony shows that the latter claimed there was \$1000 still due him, and refused to execute the deed until he had received a conveyance of three of the lots referred to in the contract. Such conveyance was made by Davis at the instance and request of Hall, and the former now claims he should, before giving up the farm, be paid the sum of \$100 for each of these lots, that being the sum he was entitled to receive under the terms of the contract. But if it should be conceded he can set up this equity in the face of the averments of his bill we are of opinion an answer to it is found in the fact, which we think the testimony establishes, that he has received already from *other collaterals* applicable to these overdue instalments, a sum much larger than the \$300 due for these lots, and, indeed, a sum quite sufficient to cover this amount and also the amount he has paid for taxes. We therefore discover no equitable ground under which the appellant can longer retain the title to this farm.

It appears that the Court below refused an application of the appellant to remand the commission in order to enable him to take further testimony. Assuming, without however so deciding, that the order refusing this application, is the subject of review on appeal from the final decree, we are clearly of opinion the application came too late and was properly rejected. The bill was filed on the 14th of November, 1876, and this application was not made until the 20th of January, 1879, the commission having been closed and returned on the 10th of May, 1878. The complainant was afforded ample time and opportunity to take all the testimony he desired, and the original answer, as well as the course of the testimony itself, fully apprised him of the defences relied on and of what he would have to prove to make out his case. Beside this, he was himself all the while complaining of delay on the part of the defendant in taking testimony, and in fact

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Davis *vs.* Hall.

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obtained from the Court more than one order for the return of the commission. We know of no rule of equity practice that would under such circumstances justify the granting of his application.

It is hardly necessary to say that the manuscript copy, produced before us during the argument by the appellee's counsel, of certain testimony which appears to have been taken in the equity case in the District Court, cannot be received or considered by this Court as forming part of the testimony in this case. It was not taken under the commission and forms no part of the record of the equity cause which was offered in evidence. It seems to have been attached to the return of the commission without authority, and is not embodied in the record. We have however examined that testimony, and even if it were properly before us as part of the testimony in the case, it would not in any wise change the conclusions we have reached and the views we have expressed.

The result therefore is that the decree appealed from must be affirmed.

*Decree affirmed.*

(Decided 9th January, 1880.)

GIDEON BANTZ, Executor of ANN M. BANTZ vs. WILLIAM S. BANTZ, THEODORE S. BANTZ, and others. WILLIAM S. BANTZ, THEODORE S. BANTZ, and others vs. GIDEON BANTZ, Executor of ANN M. BANTZ.

*Accounts of an Executor or administrator subject to Revision and correction in the Orphans' Court—Passage of a Claim by the Orphans' Court against a Decedent's estate—Claim by an Executor to be allowed for Services rendered his Testatrix in her life-time—Right of parties interested in Decedent's estate, to object to such Claim—What is a reasonable Time within which a motion for a Revision and Correction of an Executor's account may be made—Parties not excluded as Witnesses, under the Act of 1864, ch. 109, and its Supplements—Improper claim by an Executor—What necessary to Justify a claim for Services rendered a Deceased person—Costs in the Orphans' Court discretionary under Art. 93, sec. 250, of the Code—Proper allowances to an Executor.*

So long as the estate of a decedent is open, that is, not finally closed and settled, the accounts of the executor or administrator in the Orphans' Court, are subject to revision and correction in respect of any matter discovered to be erroneous.

The simple passage of a claim against a decedent's estate by the Orphans' Court, or the passage and approval of an account retaining for it, does not establish the correctness of either.

The passage of a claim by the Orphans' Court, does not bind the executor to pay it; he may still resist it, and the claimant is put to his proof.

Parties interested in the distribution of a deceased's estate, may, in a proper way, and within a reasonable time, object to the propriety of a claim preferred by the executor of the deceased for services rendered her, in her life-time, although it has been passed upon and allowed *ex parte*, by the Orphans' Court, and included by the executor in his account.

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*Bantz, Ex'r vs. Bantz, et al.*

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An executor preferred a claim, in his own behalf, against his testatrix for services rendered her, in her life-time, and included it in his first administration account dated the 15th of December, 1874, which was passed, and approved by the Orphans' Court. The inclusion of this claim in his account gave the appearance of an over-payment of the estate. This over-payment was brought forward successively in each of the two following accounts as a matter for allowance. The third account was passed on the 27th of April, 1878, and within ten days thereafter, an application by parties interested in the distribution of the estate, was made for a revision, and to strike out. **HELD :**

That this was a reasonable time within which to seek a correction of the errors and improper charges of the executor.

Parties interested as devisees under the will, in the distribution of the estate of a deceased person, are not excluded under the Act of 1864, ch. 109, and the supplements thereto, from testifying adversely to a claim made by the executor of the estate, which he seeks to have allowed, for services rendered his testatrix.

An executor cannot rightly claim to be allowed out of the estate of his testatrix, his mother, for the cost of renovating, and removing to another place, the tombstones of the grand-parents of himself and other devisees under the will.

To justify a claim against a deceased's estate for services rendered the deceased, it must appear that there was a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay, for the services. There must have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment.

The awarding of costs in a litigation in the Orphans' Court, is, under sec. 250 of Art. 98 of the Code, altogether in the discretion of the Court, and is not reviewable on appeal.

An executor may rightly claim to be allowed out of the estate of his testatrix for fertilizers furnished by himself, to her in her life-time.

Where a farm, part of the estate of a deceased person, is, under the will, in the hands of her executor for sale, and is managed by him, and he charges himself with all the proceeds of the crops raised thereon, he is entitled to be allowed out of the estate for fertilizers used in their production.

**CROSS-APPEALS** from the Orphans' Court of Frederick County.



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Bantz, Ex'r vs. Bantz, *et al.*

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The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, ROBINSON and IRVING, J.

*John Ritchie*, for Gideon Bantz, the executor.

*James McSherry* and *Milton G. Urner*, for William S. Bantz, and others.

IRVING, J., delivered the opinion of the Court.

In the autumn of 1873, Mrs. Ann M. Bantz, of Frederick County, died leaving a will, in which her son, Gideon Bantz, was appointed executor. He accepted the trust, and proceeded to administer the estate. He passed three administration accounts, dated respectively on the 15th of December, 1874, the 29th of November, 1876, and the 27th of April, 1878.

At the time of passing the third account, he made distribution of the balance, which his accounts showed to be in his hands, among the devisees under the will; but this distribution was not made under the order of the Orphans' Court, and was not made after notice to persons interested as required by the Code. On the 10th day of May, 1878, the devisees under the will of Mrs. Bantz, filed a petition in the Orphans' Court, wherein said accounts had been passed, alleging the existence of sundry errors in the executor's accounts, and charging that sundry claims and allowances had been made to the executor, which were not proper charges against the estate, and ought to be stricken from his accounts; and praying for the several accounts to be set aside, and a new account to be stated, in which the items objected to should be disallowed. After answer and proof, the Orphans' Court set aside all the accounts of the executor, and ordered a new account to be stated, wherein some of the items

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Bantz, Ex'r vs. Bantz, et al.

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objected to by the petitioners should be excluded, but others should be included and allowed. From this order of the 4th day of March, 1879, both parties have appealed, and it is the subject-matter of these cross-appeals, which we are now to consider. The first question for our decision, relates to the right of the petitioners to file their petition, by way of exception to the executor's administration accounts, when they did, and the right of the Orphans' Court to hear and determine the objections of the petitioners, so, and then interposed. The appellant, (the executor,) contends that the special claims, to the striking out and disallowance of which by the Court, he excepts, and from which he appeals, had been passed upon by the Court, and allowed to him too long, without objection on the part of the petitioners; and he is to be regarded as having paid the claims to himself; and that the petitioners were guilty of fatal *laches* in the premises. The counsel for the appellants concede that errors should be corrected, and assent to certain corrections ordered by the Court; but insist, that the account of the executor, for services rendered the testatrix for nineteen years preceding her death, and the claim for allowance on account of renovating the tomb of his, and the petitioners' grand-parents, cannot now be attacked. We do not think the cases of *Donaldson's Ex'rs vs. Raborg, Adm'x d. b. n.*, 28 Md., 34, and *Owens vs. Collinson*, 3 G. & J., 25, sustain this position. Both those cases recognize the accounts as only *prima facie* right, but liable to be attacked with proof against them; and in cases of *great lapse* of time, and when the executor was dead, the Court held that strong proof would be required to overthrow the accounts. The Orphans' Court is the proper and primary tribunal, (although sometimes a Court of equity is invoked,) to determine all such controversies, and this Court has repeatedly said, that so long as an estate is open, (which means not finally closed and settled,) the accounts of the

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Bantz, Ex'r vs. Bantz, *et al.*

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executor or administrator, in that Court, are subject to revision and correction as to any matter discovered to be in error. *Edelin vs. Edelin*, 11 Md., 415, and *Stratton's Case*, 46 Md., 551.

The simple passage of a claim against the estate, or the passage and approval of an account retaining for it, does not establish the correctness of either. The most that it accomplishes is to protect the administrator or executor, if he actually pays it without knowledge of its incorrectness. Passage of a claim by the Orphans' Court, does not bind the executor to pay it; he may still resist it, and the claimant is put to his proof. Here, the claim for services is preferred by the executor against the testatrix, with no one to object but the petitioners. He is his own paymaster, and because he has chosen to put it into his accounts, and gotten the *ex parte* approval of the Orphans' Court to it, it is clear that he ought not, until the estate is wholly closed, to be regarded in the same light, as if, on the faith of the Court's approval, he had paid a stranger his claim against the estate; but the persons interested in the estate and its distribution ought to be permitted, in a proper way, and within proper time, to make their objections to the propriety of his claim. We think this application was within proper time. The claim alluded to was only passed by the Court three days before the passage and approval of the first administration account.

The inclusion of that claim in the account created the appearance of an over-payment of the estate; but it was only apparent. That over-payment was brought forward in each of the other accounts, as a matter for allowance successively. After the third, a distribution was struck, and then came the application for revision. The third account was passed on the 27th day of April, 1878, and the application for revision and to strike out, was made within ten days thereafter. This was certainly a reason-

able time within which to seek a correction of the errors and improper charges of the executor. The last account was based on the others, and in fact the claim of the executor, in the form of a charge for over-payment, was actually made in, and allowed by the last account. The distribution was wholly an act of the executor. It does not profess to be made by the Court, and after the notice required by the Code. The estate is so far open as to admit the investigation sought by the petitioners. Whether the Orphans' Court ruled correctly, will be considered presently.

We must first dispose of some questions of evidence. It was objected on the part of the executor, that the petitioners were incompetent witnesses to impeach his claim. The Orphans' Court overruled this objection, and we think that decision right.

The petitioners are clearly not excluded as witnesses by the Act of 1864 and supplements, unless they fall within some of the exceptions of the said Act or its supplements, and are thereby excluded. Those exceptions relate to the case of the death of an original party to a contract or cause of action, or to his insanity, or to cases where an executor is a party to the suit, in either of which cases the other party is excluded. The petitioners were certainly in no sense parties to the contract. This proceeding is not for the purpose of enforcing a charge against the executor, as executor, of the estate. It is a proceeding by which an executor is sought to be prevented from retaining for his own claim against the estate; which claim is alleged to be unjust, and not due and owing, by the testatrix. If it were a claim of another person against the executor, these parties would undeniably be competent to testify adversely to the claim.

There is, therefore, no reason why in this case they should not be competent. The executor, *as such*, and the

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Bantz, Ex'r *vs.* Bantz, *et al.*

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executor, *as creditor* of the deceased, must be regarded for the purposes of this decision as different persons.

These witnesses appear against him not as executor, but as creditor of the estate seeking payment, and as if seeking payment from one other than himself, clothed with power to pay. The fact, that the executor and the claimant are one and the same person, cannot work an exclusion which would not otherwise exist. The statute never contemplated any such result. The statute contemplated suits or proceedings against an executor for the purpose of enforcing a claim against the estate, not of resisting a claim of the executor, as this case is. There is no ground for applying the rule as one of mutuality, which this Court has so often said was the object of the statute.

Certain declarations and admissions of the appellant, Gideon Bantz, touching his services to his mother, made to Albert Gallion, were given in evidence by the petitioners. Gideon Bantz, on his own offer, was produced as a witness to contradict Gallion as to those statements. Objection being made, the Court held, that being a party to the alleged contract, and the other party being dead, he was incompetent. To this ruling exception was taken. We intimate no opinion on this question. It is unnecessary to the decision of this case, and being an important question, it may properly be reserved for further consideration and future decision, if the question should arise again where it is important. Here, according to the view we take of the other proof in the cause, it is immaterial whether he would contradict Gallion in that particular or not; assuming that he would unqualifiedly do so, there is enough proof in the cause to control the decision of it, exclusive of Gallion's statement in that regard. The other exceptions to testimony on both sides are also immaterial, and therefore we do not consider them.

Respecting the claim on the part of the executor for the renovation of the tombstones of the grand-parents of

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Bantz, Ex'r vs. Bantz, et al.

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himself and the petitioners, and their removal to another place, it is sufficient to say, that such claim is not a legitimate charge against the testatrix's estate. It is not pretended to be a debt due by the decedent, and it is as certainly not embraced within funeral charges of the deceased, or administration expenses. Properly speaking, therefore, it was not a charge for which the executor had a right to claim allowance for paying. However meritorious in itself the charge may be, as against the petitioners for their proportion of it, no such proof has been presented as works an estoppel upon them from objecting to its allowance. As a claim against the estate it cannot be admitted into the accounts of the executor and be allowed to him. The Orphans' Court therefore did right in striking it from the account. The action of the Court in respect to the claim of Gideon Bantz, for services rendered the testatrix in her life-time, was in our opinion equally proper.

In *Guild vs. Guild*, 15 *Pickering*, 129, the jury were instructed, "that if under *all the circumstances of the case* the services were of such a character as to lead to a reasonable belief, that it was *the understanding* of the parties that pecuniary compensation should be made for them, then they might find an implied promise and *quantum meruit*." The case of *Lee vs. Lee and Welch*, 6 *G. & J.*, 316, and *Stockett vs. Jones and Wife*, 10 *G. & J.*, 276, proceed upon the same principle. In order to justify a claim for services being allowed against a decedent, there must have been a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay for the services. The services must have been of such character, and rendered under such circumstances, as to fairly imply an understanding of payment, and a promise to pay. There must have been an express, or implied understanding between the parties that a charge for the services was to be made, and to be met by payment. This Court has

said in *Lee vs. Lee and Welch*, 6 G. & J., 316, that it is familiar law, that if services are rendered with the expectation of compensation by will, a charge cannot afterwards be preferred against the person for them. This claim is unquestionably suspicious on its face. It is for nineteen years service. It is the account of a man who had large dealings with the alleged debtor, and through whose hands large sums of the alleged debtor's money were continually passing, from which, in settlements, he could have retained his pay. It is in proof, that a settlement was had a short time prior to her death, and no mention of any such claim appears to have been made; and if it were, it would afford evidence of payment in that settlement. It is in proof, that the claimant was in need of advances, and was from time to time receiving advances from his mother, for which he was charged, that it might be deducted from his share of the estate. During the period covered by this charge for services, he received three thousand dollars in money, by way of advancement. If, at that time, he had intended his services to be anything more than filial and dutiful service, and intended to make a regular charge for them, and actually had a claim and charge against his mother, he would have received the money as payment and not as advancement. She was entitled to be credited on what she owed him, if she did owe him. It is clear, that she did not think she was in his debt, or she would not have charged him with the money he got, as advances. She would have paid her debts. If it were a real debt, the creditor would be entitled to interest, and the debtor liable to pay it. In the claim he has preferred, he has not charged interest; but if she supposed he had a claim against her, she would naturally think it was drawing interest, and would stop it by payment. It is not denied that the claimant did do many frequent and most useful services for his mother, as a considerate and loving son would do; whereby, no

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Bantz, Ex'r vs. Bantz, *et al.*

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doubt, the estate was increased; and it would have been very natural if he had thought he was by that means most likely benefitting himself; but we see nothing in the proof, tending to show an expectation, on *his part*, to make a charge, and be paid accordingly, or on her part of expectation, that she was to pay for the services, as for services rendered by any other person. The only declarations made by the testatrix, offered in evidence, (which are very few, considering the period covered by the services,) certainly imply, that there was no understanding on the subject; on the contrary would indicate, that the mother had no idea he was making a charge against her. They indicate appreciation of his attention to her and her business; but they exclude the idea in her mind that he was making a charge for the service. In view of the service, its character, its duration, the conduct of the parties, the fact that no information was ever given the testatrix of intention to charge, that no price was fixed till after her death, his consultation with the Court as to what he ought to charge, and the statement a few days after her death, that he thought he ought to be paid something, we cannot think the declaration of the mother, at one time, that he "should not be the *loser*," and at another, that he "should be *well* paid," could have any reference to any payment other than by gratuity by will. That he so understood it, is irresistibly indicated by the lapse of time he permitted to pass without hinting a purpose to charge for it.

If it had been his purpose to charge her, as for similar services to other people, he would not have allowed so long a period to elapse without an agreement fixing his right to be paid and the amount he was to receive. He would not have left it to be wholly settled after her death.

He would not have risked the danger of resistance to such claim from those who might become entitled to the estate at her death, and whose interest it would be to



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Bantz, Ex'r *vs.* Bantz, *et al.*

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resist it. His admission to one of the parties that he gave no notice of such claim, and withheld it till it was passed and put in the account, because he "knew that they would object" to the claim, is strong proof that he was making an unexpected claim, and that this was the reason why it should not be expected to be made. The statement to Mr. Getzendanner a day or two after his mother's death, that "he thought he ought to have something," fairly implies that he was disappointed in some way, and for the first time began thinking of getting paid in this way, and that in his mother's life-time he had not expected to charge for his services.

The decision of the Orphans' Court, therefore, so far as the appeal of Gideon Bantz is concerned, will not be disturbed.

In the cross-appeal of the petitioners, complaint is made, in their prayer of appeal, of the action of the Orphans' Court, 1st, in allowing the claim of \$112.50 for fertilizers furnished while the farm was in the hands of the executor and being managed by him. 2nd, of the \$100 for the fertilizer in the executor's individual account against the deceased. 3rd, of the \$1200 allowed for a monument for the deceased, purchased by the executor. And 4th, for the imposition of the costs of the investigation upon the estate instead of the said Gideon Bantz personally. So far as the question of costs is concerned, the whole matter was in the discretion of the Orphans' Court under section 250 of Article 93 of the Code, and is not reviewable in this Court.

With reference to the fertilizer included in the executor's account against the decedent, we see no sufficient reason to disapprove that allowance. Independent of his own affidavit, there was proof of his furnishing the fertilizer, and the value of it was, we think, sufficiently vouched. We think the Court was right in allowing the other fertilizer bill. The land was under the will, in the hands

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Bantz, Ex'r vs. Bantz, et al.

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of the executor for sale. Until the sale was made, he managed the estate, and charged himself with all the proceeds of crops raised on the farm; and it is but right that he should be allowed for the expenses incident to the production of the crops. The proof introduced to impeach the correctness of the bill, is not by any means conclusive in its character, but is very vague. We see nothing to justify a reversal of the decision of the Orphans' Court in this particular.

The only remaining question presented by the prayer of appeal, relates to the allowance claimed by and allowed to the executor, by the Court for a monument over the deceased. Notwithstanding this was included in the prayer of appeal, it is not considered or alluded to in the brief of the cross-appellants, and in the recapitulation of the amounts wherein they claim to be damnified by the ruling of the Orphans' Court, and the arithmetical summary by which they exhibit the amount of loss occasioned by the erroneous charges of the executor, the allowance for a monument is wholly excluded. We assume therefore, that they concluded to acquiesce in that allowance, and abandon that objection. The questions presented thereby, therefore, we do not consider.

The decision of the Orphans' Court respecting the matters covered by both appeals will be affirmed, and each party will be required to pay his own costs.

*Order affirmed, each party  
to pay his own costs.*

(Decided 9th January, 1880.)

## JOHN W. BECHTEL vs. JOSEPH M. CONE.

*Parol Contract—Executed Contract—Statute of Frauds—Waiver of a Condition precedent—Facts insufficient to warrant the treating of a Contract as abrogated—Right of action—Acts which constitute a binding Contract for the Sale of a house—Specific performance—Decree for the execution of a Deed.*

It was verbally agreed between A. and B. that A. should do the plumbing and gas-fitting in ten houses of B. for the sum of \$2050. Subsequently another contract was verbally made between the parties, that A. should take a certain house of B. at the price of \$1200, subject to a certain mortgage resting on it, in part payment of the work, and the balance only in money. The work contracted for was all done, and some extra work besides, all of which was satisfactory. It was in evidence that an appointment was made for a settlement, and that A. directed certain attorneys to examine the title, and prepare a deed for the house, which was done, and he paid for its preparation. The deed was executed by B. and left with the Justice of the Peace who took the acknowledgment, for A. who called to get it, but declined to receive it, because certain tax receipts had not been left with it, and for no other reason; of this refusal or the reason for it, B. had no notice. A. testified that all the taxes were to be paid by B. before he was to take the property, and B. admitted he was to pay the taxes in arrear, but did not understand it was a condition precedent to the consummation of the agreement. Subsequently to the execution of the deed, and its being left with the Justice for A., the parties met and settled for the work done. The price of the house was deducted from the gross cost of the work done, and the cash or its equivalent was paid for the residue, and A. executed a receipt in full. At that time, A. asked for the tax bills and receipts, and B. promised they should be sent to him. At the time of the settlement, B. gave A. an order on the tenant of the house for the rent; and for fourteen months thereafter, A. received the rent from the tenant, and paid one year's ground-rent. Meanwhile the deed remained in the hands of the Justice, and never was taken away; though B. was never notified thereof. A. in August, 1876, offered the house for sale at

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Bechtel vs. Cone.

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public auction, but it was not sold, the price asked for it not being bid. A. received the rents from the tenant till about July, 1877. A. testified that when he agreed to take the house, the mortgage resting on it, was stated to be \$1200; the deed which was prepared for him recited that it was subject to a mortgage of \$1250. A. stated that after the settlement and the receipt of the order for the rent, he examined the house, and found it did not come up to representation. He gave no notice, however, of exception either on account of its defects or of the excess of the mortgage claim over the alleged representation. A. admitted that at the time of the bargain or negotiation, B. requested him to examine the house for himself, B. being notified by the mortgagee at one time that he had some difficulty in getting his mortgage claim fixed up by A. because of some unpaid taxes. B. paid them, and told A. who said it was "all right," and afterwards saw the mortgagee and promised to pay the interest. In an action of assumpsit by A. to recover from B. a balance alleged to be due, it was HELD:

- 1st. That assuming the facts stated, to be true, the contract for the purchase of the house had become an executed contract by the payment of the purchase money and the entry into possession and exercise of all the acts of ownership; so that it was wholly "extracted from" the operation of the Statute of Frauds.
- 2nd. That if the payment of the taxes were originally intended to be a condition precedent to the consummation of the arrangement, the evidence of the conduct of A. afterwards, was sufficient to warrant a jury in finding a waiver, under instruction from the Court; and the subsequent notice of taxes in arrear and of distress for the same, of which A. gave no notice to B. did not warrant his treating the contract as abrogated thereby.
- 3rd. That if A. had paid the taxes, he would, under their arrangement, have had a right of action against B., but he could not at that time repudiate the contract and abandon the house.
- 4th. That in order to make the contract for the sale of the house a binding one on A., it was not necessary that a deed should have passed; his acceptance of possession, and exercise of all the acts of ownership for so long a time, and the payment of the purchase money by his work, as was agreed, would have entitled him to a specific performance and to a decree for the execution of a deed to him; and *e converso*, B. was entitled to hold him to the contract, in the absence of fraud, of which there was no proof.

APPEAL from the Superior Court of Baltimore City.

The case is stated in the opinion of the Court.

*Exception.*—The testimony having been closed, the plaintiff offered the following eight prayers:

1. That if the jury shall find from the evidence before them, that the plaintiff agreed with the defendant to do the plumbing and gas-fitting work, and furnish the materials necessary therefor in certain houses of the defendant, for a price agreed upon between them, and that he did the work and furnished the materials in accordance with his said contract, and that other work not provided for by the said contract, was also done by the plaintiff and materials for the same furnished at the defendant's request, during the construction of the said houses, then the plaintiff is entitled to recover the said contract price, and the fair value of the said extra work and materials, less whatever the jury may find that he has received on account of the same, with interest upon the said balance from the date of completion of all the said work, in their discretion.

2. That the defendant cannot rely in support of his pleas of payment or set-off upon the contract between himself and the plaintiff, to receive his interest in a certain house on Gilmore street, in part payment for the work and materials in the plaintiff's first prayer mentioned, unless they shall find that the said agreement, or some memorandum or note thereof, was reduced to writing and signed by the plaintiff, or some person thereunto by him lawfully authorized, and that there is no evidence of such reduction to writing and signature.

3. That the defendant cannot rely in support of his pleas of payment or set-off upon the alleged conveyance to the plaintiff of his interest in a house on Gilmore street, unless they shall find that a deed for the same was delivered to and accepted by the plaintiff, or some person thereunto by him lawfully authorized, and that there is no evidence of such delivery and acceptance.

4. That under the pleadings, there is no evidence in this cause legally sufficient to enable the jury to find for the defendant upon the issue joined on his plea of set-off.

5. That the Court to exclude from the consideration of the jury the deed purporting to convey to him the defendant's interest in a house on Gilmore street, there being no evidence that the same conveyed any title in the said property.

6. That if the jury shall find from the evidence that the plaintiff agreed to accept a conveyance of the defendant's interest in a house and lot on Gilmore street, in part payment for the work and materials in the plaintiff's first prayer mentioned, upon condition that all taxes upon the said house and lot should be paid by the defendant up to the date of completing the said work, and that the said taxes were not so paid at that time, or within a reasonable time thereafter, then the plaintiff is entitled to repudiate the said agreement, and to recover in this action as though he had never entered into the same.

7. That if the jury shall find from the evidence that the plaintiff agreed to accept a conveyance of the defendant's interest in a house and lot on Gilmore street, in part payment for the work and materials in the plaintiff's first prayer mentioned, and that he was induced to so agree by representations of the defendant, as to the value of the said house and lot, the amount of encumbrances upon the same, and the manner in which the said house was fitted up, which representations were in fact false, and known by the defendant to be such at the time of his making them, then the plaintiff is entitled to repudiate the said agreement, and to recover in this action as though he had never entered into the same.

8. That if the jury shall find from the evidence that the plaintiff agreed to accept a conveyance of the defendant's interest in a house and lot on Gilmore street, in part payment for the work, and materials furnished by him to

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Bechtel vs. Cone.

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the defendant, and that he was induced to so agree by representations of the defendant, as to the value of said house and lot, the amount of the encumbrances upon the same, and the manner in which the said house was fitted up, which representations were in fact false, and known by the defendant to be such at the time of his making them, then the plaintiff is entitled to repudiate the said agreement, and recover in this action, as though he had never entered into it; unless they shall further find that the plaintiff after discovering the falsity of the said representations, or when he might have discovered their falsity by the exercise of reasonable diligence, (*agreed to adhere to the said contract, or took action from which the defendant might reasonably infer that he intended to adhere to the same.*)

The Court (DOBBIN, J.,) granted the fourth prayer of the plaintiff, and rejected his first, second, third, fifth, sixth and seventh, absolutely, and rejected the eighth as offered, but granted it with a modification which consisted in striking out the part of the prayer in italics and brackets, and substituting therefor the following: "*Entered into the possession of the said property by collecting the rents thereof, and paying the ground rent thereon, from which acts, if the jury shall find them, amount to a waiver of objection to said representations.*"

And the defendant offered the three following prayers:

1. If the jury shall find from the evidence, that the plaintiff and defendant entered into an agreement for the doing of certain plumbing work by the plaintiff, in ten houses on Carey street, which were built by the defendant, in consideration of the sum of two thousand and fifty dollars, eight hundred and fifty dollars to be paid in cash as the work progressed, and the balance in the interest which Cone had in a house on Gilmor street; and shall further find, that after the work was performed by the plaintiff, a deed for the said house was drawn by Mess. Brown and Smith for the plaintiff, and that said deed

was given to Cone to be acknowledged and left with Justice McCaffray, before whom it was acknowledged by said Cone, with directions to deliver it to the plaintiff; and shall further find that the plaintiff called at the office of said justice and refused to receive the said deed because some paper was not left with it; and shall further find that afterwards, on the 25th day of April, 1876, the said plaintiff and defendant made a settlement between them in relation to the amount of such contract, and also to all extra work done by the plaintiff for the defendant; and shall also find that the plaintiff took possession of said house on Gilmor street, in March, 1876, and collected the rent therefor for a long time thereafter, paid the ground rent, and offered the said property at public auction, *then* the claim of the plaintiff in this case has been paid by the defendant, and the plaintiff is not therefore entitled to recover in this action, although the jury may believe that certain taxes remained due upon said property.

2. That unless the jury find from the evidence that the plaintiff, after the settlement made between the plaintiff and defendant, on the 25th of April, 1876, gave notice to the defendant that there were taxes due upon the property on Gilmor street, and demanding that they be paid, and that the defendant refused or neglected to pay such taxes, then the plaintiff was not authorized to treat the contract between himself and defendant as rescinded (*and to sue for the value of the said house, or for his services, and the plaintiff is not therefore entitled to recover in this case.*)

3. That if the jury believe from the evidence, that on or about the 25th day of April, 1876, the plaintiff and defendant made a settlement between them of all matters of account then open between them, and that after such settlement the said plaintiff took possession of the property on Gilmor street, and had notice that the deed for such property was at Justice McCaffray's, subject to his



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Bechtel *vs.* Cone.

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order, then the plaintiff is not entitled to recover in this case.

The Court granted the first and third prayers of the defendant as offered, and the second was modified, by striking out the portion in brackets and italics.

To the action of the Court in rejecting his first, second, third, fifth, sixth and seventh prayers, absolutely, and his eighth as offered, and in granting the first and third prayers of the defendant as offered, and his second prayer with a modification, the plaintiff excepted, and the verdict and judgment being against him, he appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY, ROBINSON and IRVING, J.

*W. Hall Harris* and *Charles J. Bonaparte*, for the appellant.

*Richard S. Culbreth* and *Samuel Snowden*, for the appellee.

IRVING, J., delivered the opinion of the Court.

The appellant sued the appellee in the Superior Court of Baltimore City, in an action of *assumpsit*. The declaration was for goods bargained and sold, work and labor done, and contained the ordinary money counts. The defendant pleaded never indebted, never promised, payment and set-off. It was admitted that there was a verbal contract between the appellant and appellee, that the appellant should do the plumbing and gas-fitting in ten houses of the appellee, for the sum of two thousand and fifty dollars in money. After making that contract, it appears that another contract was verbally made between the parties, that the appellant should take a certain house of the appellee, at the price of twelve hundred dollars, subject to a certain mortgage resting on it, in part pay-

ment for the work, and the residue only in money. The only questions in the case grow out of this new contract, (whereby the mode and terms of payments provided for in the first contract, were designed to be changed,) and arise upon the prayers granted and refused. It is urged by the appellant that there were conditions precedent to be performed by the appellee, before the contract was to be consummated; that there were representations concerning the property which proved untrue, and justified his repudiating the contract; and that being a contract for an interest in lands, it is within the fourth section of the Statute of Frauds and void, because the same was not reduced to writing. To determine whether the Superior Court ruled correctly on the prayers, which were intended to present the several phases of these questions, it is necessary to review briefly the facts bearing thereon.

After the making of this verbal contract for the sale of the house on the one side, and its acceptance in part payment for work done, on the other, it is admitted that the work contracted for was all done, and some extra work besides, all of which was satisfactory. It is in evidence, that an appointment was made for a settlement, and that the appellant directed certain attorneys to examine the title and prepare a deed for the house, which was done, and he paid for its preparation. It was also proved that the deed was executed by the appellee, and left with the justice who took the acknowledgment, for the appellant, who called to get it, but declined to receive it because certain tax receipts had not been left with it, and for no other reason; but it was admitted the appellee had no notice of this refusal, or the reason for it. The appellant testified that all the taxes were to be paid by the appellee before he was to take the property. The appellee admitted he was to pay the taxes in arrear, but did not understand it was a condition precedent to the consummation of the agreement. Subsequently to the execution of the deed, and

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Bechtel vs. Cone.

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its being left with the justice for the appellant, the parties met and settled for the work done. The price of the house was deducted from the gross cost of the work done, and the cash or its equivalent was paid for the residue, after deducting the house, and the appellant executed a receipt in full. At that time the appellant asked for the tax bills and receipts and the appellee promised they should be sent to him. At the time of this settlement, the appellee gave the appellant an order on the tenant of the house for the rent; and for fourteen months thereafter the appellant received the rent from the tenant, and paid one year's ground rent. Meanwhile the deed remained in the hands of the justice and never was taken away; though the appellee was never notified thereof, notwithstanding they had met sundry times.

The appellant, in August, 1876, advertised the house, and offered it at public auction, but the auctioneer said the price the appellant put on it was not bid, and it was not sold. The appellant received the rents from the tenant till about July, 1877. The appellant testified, that when he agreed to take the house, the mortgage resting on it was stated to be \$1200. The deed which was prepared for him recites that it is subject to a mortgage of \$1250. He also states, that shortly after the settlement, and his getting the order for the rent, he called to examine the house and found it did not come up to representation. He gave no notice of exception, either on account of the defects in the house, or the excess of mortgage over the alleged representation. The appellant admitted, that at the time of the bargain or negotiation, the appellee requested him to go and look at the house for himself. The first notice the appellee had of discontent was this suit. Appellee being notified by the mortgagee at one time, that he had some difficulty in getting his mortgage claim fixed up by the appellant, because of some unpaid taxes, the appellee paid them and told the

appellant, who said it was "all right," and afterwards saw the mortgagee and promised to pay the interest. Assuming all these facts to be true, we have no hesitation in deciding, that the contract for the purchase of the house had become an executed contract, by the payment of the purchase money and the entry into possession, and exercise of all the acts of ownership; so that it was wholly "extracted from" the operation of the Statute of Frauds. It comes fully up to the case of *Dugan, et al. vs. Gittings, et al.*, decided by this Court in 3 *Gill*, 157, where in it is said, "there are to be found in this case two ingredients, which, when combined, have always been regarded as relieving a parol agreement from the operation of the Statute—performance of the condition, and change of possession under the contract." This is the established law in this State, and everywhere. If the payment of the taxes were originally intended to be a condition precedent to the consummation of the arrangement, the evidence of the conduct of the appellant afterwards, was sufficient to warrant a jury in finding a waiver, under instruction from the Court; and the subsequent notice of taxes in arrear, and of distress for the same, of which the appellant gave no notice to the appellee, did not warrant his treating the contract as abrogated thereby. If he had paid them, he would, under their arrangement, have had a right of action against the appellee, but he could not at that time repudiate the contract, and throw up the house.

The first and second prayers wholly ignore all the evidence, which, if the jury should find to be true, would warrant a verdict for the defendant, and were, therefore, properly rejected.

The third prayer was correctly refused, for in order to make the contract for the sale of the house a binding one on the appellant, it was not necessary that a deed should have passed at all. His acceptance of possession, and

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 Weaver vs. Leiman.
 

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exercise of all the acts of ownership for so long a time, and the payment of all the purchase money by his work, as was agreed, would have entitled him to specific performance, and decree for execution of a deed to him, and *e converso*, the appellee was entitled to hold him to the contract, in the absence of fraud, of which there is no sign or proof. The fifth, sixth and seventh prayers, proceeded upon a theory, which excludes from the consideration of the jury all the evidence establishing a waiver. For the reasons already set forth, it is evident, that the eighth prayer of the appellant was properly modified by the Court, and granted as modified; and that there was no error in the instructions on the behalf of the defendant.

The judgment will be affirmed with costs.

*Judgment affirmed with costs.*

(Decided 13th January, 1880.)

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WILLIAM H. WEAVER vs. GEORGE W. LEIMAN.

*Statute of Limitations—Bill in Equity for an Account—Demand in Equity by Cestui que trust of an Account from Trustee—Statute of Limitations as applicable to Implied or Constructive Trusts—Petitioner for the benefit of the Insolvent Laws—Petitioner not actually Insolvent—Who entitled to Surplus remaining after payment of Debts—When Limitations are in favor of a Stranger to a Trust—Effect of a party's Intrusion upon an Infant's estate—What does not affect the running of the Statute of Limitations—Entries in a Family Bible or Testament as Evidence—When entries in the Baptismal Register of a Church made by the Clergyman, are admissible in Evidence.*

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Weaver vs. Leiman.

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As a general rule the Statute of Limitations is a bar to a bill in equity for an account, just as it is a bar to an action of account in a Court of law.

Where there is an express, subsisting and recognized trust, and the *cestui que trust* demands in equity an account from the trustee, neither the period of limitation prescribed by Statute, nor length of time is a bar to relief.

But where there is merely an implied or constructive trust arising by operation of law, Courts of equity, as a general rule, will follow and obey the law by applying the statutory limitation of time.

The fact that a petitioner for the benefit of the insolvent laws is not actually insolvent, does not affect the validity of his discharge, nor oust the jurisdiction of the Insolvent Court.

In such case the surplus remaining in the hands of the trustee, after payment of debts, belongs to the insolvent by way of resulting trust, and is not held by the trustee under any *express trust* for the benefit of the petitioner.

Where there is a trustee competent to sue and protect the trust estate, limitations run in favor of a *stranger* to the trust, notwithstanding the *cestui que trust* may be an infant.

A party intruding upon an infant's estate becomes constructively his guardian or trustee, but against such a trust limitations run; and to avoid the bar, the bill for account must be filed within three years after the infant arrives at age.

Mere doubt as to the right, or difficulty in the way of its assertion will not affect the running of the Statute; apart from the disabilities expressed in the Statute itself, there must, in order to prevent its operation, be some insuperable barrier, or some certain and well defined exception clearly established by judicial authority.

Entries in a family Bible or Testament are *admissible* in evidence even without proof that they have been made by a parent or a relative.

But such entries are not in all cases *conclusive* of the facts stated; their weight as evidence is subject to be weakened or strengthened by all the proof in reference to them.

Who made the entries, when they were made, and whether the book has been so kept as to be accessible at all times, to all the members of the family, are all matters to be considered in determining the *probative force* of such entries.

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Weaver vs. Leiman.

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Entries in the baptismal register of a church made by the clergyman in the regular discharge of his clerical duties, are admissible in evidence, after his death, though there is no law requiring such records to be kept.

Ordinarily such entries are admissible only for the purpose of proving the fact and date of baptism, and not of other matters therein stated, such as the date of the birth of the child.

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BOWIE, MILLER, ROBINSON and IRVING, J.

*Geo. Hawkins Williams*, for the appellant.

*John N. Steele* and *Albert Ritchie*, for the appellee.

MILLER, J., delivered the opinion of the Court.

Litigation in various forms respecting certain property which originally belonged to Conrad Leiman, has been before this Court on former occasions. By agreement, the records in those cases have been made evidence in this, and a brief statement of some of the prominent facts they disclose, is necessary to a proper understanding of the present controversy.

In September, 1852, Leiman conveyed certain leasehold property in Baltimore City, improved by several houses, to Harman Schafferman, and in May, 1854, applied for the benefit of the insolvent laws, returning in his schedule no property. William Seip was appointed his trustee, and he obtained his final discharge in due course in September, 1854. After this, in January, 1857, Schafferman re-conveyed the property to Leiman by a deed which was withheld from record until June, 1860. In March, 1860, before this deed was recorded, Schafferman sold and con-

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Weaver vs. Leiman.

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veyed the property to William H. Weaver, who thereupon entered into possession, and, as is alleged, received the rents and profits thereof, until June, 1868. In May, 1861, more than a year after the conveyance to Weaver, Leiman, for the consideration of one dime, conveyed all his estate in the property to his son, George W. Leiman, the present complainant, who was then an infant, under the age of twenty-one years, and it is upon the title acquired by this deed that he has filed the bill in this case.

Having thus given the conveyances according to their dates, we must recur to the litigation, pending which most of them were executed. In December, 1857, one of the creditors of Leiman, (Seip, the trustee, in insolvency, having refused to do so,) filed a bill in equity to set aside the deed of September, 1852, from Leiman to Schafferman, as fraudulent and void as against the creditors of the grantor. Upon this bill a long litigation ensued, and the conveyance was finally condemned as fraudulent by the judgment of this Court in April, 1868, (*Schafferman vs. O'Brien*, 28 Md., 565,) and the property directed to be sold. Two days after this decision was rendered, William H. Dawson was appointed trustee by the Insolvent Court in place of Seip, who had previously died. The new trustee proceeded at once to sell the property, and sold the same on the 15th of June, 1868, for \$4500. The money having been brought into Court for distribution, numerous creditors presented their claims, and various questions thereupon arose, which were settled by this Court in the case of *The Insolvent Estate of Conrad Leiman*, 32 Md., 225, the opinion in which was delivered in March, 1870. One of the questions presented in that case was, who had title to the surplus of the fund, if there should be any, after payment of creditors? Weaver claimed it under his deed from Schafferman of March, 1860, and George W. Leiman claimed it under the deed from his father of May, 1861. The Court held that Weaver had knowledge



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Weaver vs. Leiman.

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in fact, of the prior unrecorded deed of January, 1857, from Schafferman to Leiman, and was not therefore a *bona fide* purchaser without notice; and accordingly decided that George W. Leiman was entitled to such surplus. The case was then remanded with directions for an account to be stated, distributing the fund in accordance with the views of the Court expressed in that opinion. Upon the remanding, further exceptions were taken to the allowance of several claims and the case again came up, and was decided by this Court in an opinion which is not reported. Being again remanded, a further account was stated. Then still further exceptions were taken to certain claims and they were disallowed. Finally, an account was stated showing a small surplus, and this account, after another appeal which was dismissed, was eventually ratified, and in December, 1871, this surplus was paid over to George W. Leiman, in accordance with the decision in 32 Md., 225. Having thus briefly stated the previous litigation and its results, we are prepared to consider the case now before us.

The bill was filed on the 27th of April, 1872, after the whole proceeds of sale of this property had been thus disposed of under the proceedings in insolvency. It was filed by George W. Leiman, who bases his claim and right to sue, upon the deed to him from his father, Conrad Leiman, of May, 1861. The defendants are Weaver, and Dawson, the trustee in insolvency, but it is not pretended that any relief can be had against the latter, and it is admitted he was a mere nominal, if not an unnecessary, party. We shall therefore treat the case as if it were a proceeding against Weaver alone.

The bill charges that Weaver had possession of this property from March, 1860, until June, 1868, and during that period, received and enjoyed the rents and profits therefrom, amounting in the aggregate, as complainant believes, to some five or six thousand dollars or more, and

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Weaver vs. Leiman.

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that during the whole of this period complainant was a minor under age, and not competent to assert or protect his rights; that he is advised he has a just claim against Weaver for the amount of the rents and profits he so received, from the date of complainant's deed of May, 1861, or, that but for his wilful neglect or default might have been so received; and the bill prays that an account may be taken of the rents and profits received by Weaver during his possession of the premises from May, 1861. In his answer, Weaver, after denying that the complainant is entitled to an account, pleads the Statute of Limitations as a full and complete bar to the suit; and by a special replication to this plea, the complainant avers that when the cause of complaint and right of action accrued, he was an infant under the age of twenty-one years, and that the suit was instituted within *three years* next after he arrived at the age of twenty-one. Most of the testimony in the case relates to the age of the complainant, but before considering it, some preliminary questions must be disposed of.

Without attempting a review of the authorities, or the reasons on which they are founded, it is safe to state that the following propositions are clearly established:

1st. As a general rule the Statute of Limitations is a bar to a bill in equity for an account, just as it is a bar to an action of account in a Court of law, *Wilhelm vs. Caylor, Ex'r of Riael*, 32 Md., 151; *McKaig vs. Hebb and Brengle, Ex'rs of Booze*, 42 Md., 227.

2nd. But if a *cestui que trust* demands in equity an account from the trustee, and there is an express, subsisting, and recognized trust, neither the period of limitations prescribed by Statute, nor length of time, is a bar to relief. 32 Md., 239; *Lewin on Trusts and Trustees*, 612; *Hovenden vs. Lord Annesley*, 2 Sch. & Lef., 633; *Needles, et al. vs. Martin*, 33 Md., 619.

3rd. If however there is merely an implied or constructive trust, arising by operation of law, Courts of equity

will, as a general rule, follow and obey the law by applying the statutory limitation of time. *McDowell vs. Goldsmith*, 6 Md., 337; 2 Md. Ch. Dec., 391; 32 Md., 240; 2 *Perry on Trusts*, sec. 865.

We fail to discover in the present case any express trust which prevents the operation of the Statute upon the complainant's claim. It was decided in the insolvency case (32 Md., 225) that there was an express trust as between the trustee and the creditors, which would prevent the running of the Statute as against *their* claims, but it was not decided, nor even intimated, that there was any such trust, as between the trustee and the complainant, who claimed the surplus remaining after creditors had been paid, as assignee of the insolvent. It was simply declared that he *had title* to such surplus and it was afterwards paid to him. Looking to the scope and purpose of the insolvent laws it is plain, they neither provide nor contemplate that the trustee shall become a trustee for the benefit of the insolvent himself or his assignee. True it is, that upon his appointment and giving bond, title to all the insolvent's property is immediately vested in the trustee, but he holds that property, and is bound to administer it, for the benefit of creditors only.

That is the duty which the law requires, and that is the sole trust it creates and reposes in him. The fact however, that a petitioner is not actually insolvent, does not affect the validity of his discharge, nor oust the jurisdiction of the Insolvent Court. The surplus remaining in the hands of the trustee, after payment of debts, simply belongs to the insolvent by way of a resulting trust, and the Insolvent Court will direct it to be paid to him. *Buckey vs. Culler*, 18 Md., 432. But whether in the present case the trustee holding, as he undoubtedly did, the title to this property, had the right, and the exclusive right, to sue for and collect these rents and profits, is a very different and much more difficult question. But

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Weaver vs. Leiman.

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according to the view we have taken of the case, that question need not be decided. If the right of action for these rents was in the trustee alone, then he was competent to sue for them and protect the trust estate. Not having done so, (or at least not effectually) it is very clear that limitations had run and become a bar in favor of Weaver, the possessor of the premises and a stranger to the trust, notwithstanding the complainant may have been a *cestui que trust* under the disability of infancy. *Crook vs. Glenn*, 30 Md., 55; 2 *Perry on Trusts*, sec. 858; *Wych vs. East India Co.*, 3 *Peere Wm's.*, 309. To meet this objection the complainant must take the position that the right of action was vested in him, and the case will be disposed of upon the *assumption* that it was so vested.

At the time the complainant's title accrued under the deed of May, 1861, he was unquestionably an infant and remained so for some years thereafter. Hence it is argued that Weaver became an intruder upon an infant's estate, and it is said that whoever enters upon the estate of an infant will be considered in equity as guardian for such infant, who may after his majority recover the rents and profits by a bill in equity, and if the person entering, continues the possession after the infant comes of age equity will decree an account against him as guardian, and carry on such account after the infancy is determined. *Drury vs. Conner*, 1 H. & G., 230. This, without doubt, is a well settled and most salutary principle, and it is cited as well to sustain the jurisdiction in equity, as to affect the operation of the Statute of Limitations. There is some force in the objection on the other side, that Weaver cannot be regarded as entering or intruding upon the infant's estate, inasmuch as he derived title, and went into possession of these premises more than a year before the infant acquired his title to them. But waiving this, and conceding he was such intruder, what is the result? Simply that he thereby became *constructively* a guardian or

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Weaver vs. Leiman.

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trustee of the infant. All the authorities concede this, and, as we have shown, against such a *constructive trust*, limitations will run. To avoid the bar of the Statute, the bill must be filed within three years after the infant arrives at age. This was done in *Drury vs. Conner*, 1 H. & G., 220, and hence no question of limitations arose in that case.

But apart from infancy and the existence of a trust, various reasons why the plea should not prevail in this case have been relied on, and it is insisted: 1st. That the Statute did not begin to run against the complainant until the insolvent trust was completed in January, 1872, because until then, or shortly before, it was uncertain whether there would be a surplus or not: 2nd. That at most it did not begin to run until March, 1870, when the question of title to the surplus, as between Weaver and the complainant was settled by the decision of this Court: 3rd. That through all the previous litigation Dawson, the trustee, was acting as attorney for Weaver, and doing all in his power to protect him from this very claim for rents and profits: 4th. That when the trustee did, in July, 1870, at the request of the complainant and upon his giving him a bond of indemnity for costs, file a bill to collect these rents. Weaver in his answer set up, *inter alia*, the defence that the trustee had funds enough, and that suit against him could only be maintained by the party entitled to the surplus, and that suit was afterwards dismissed.

No doubt the complainant might, and probably would, have encountered some embarrassment and difficulty in the assertion of his claim at a much earlier period, but an examination of the records in the previous cases, as well as in this, has satisfied us that the objections stated, are not entitled to as much weight as has been ascribed to them by his counsel in argument. It is not stated for what reason the bill filed by Dawson was dismissed, but,

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Weaver vs. Leiman.

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as we understand the agreement of counsel in the present record, it was dismissed by the complainant himself, on the 10th of May, 1872. He, in fact, instituted that suit in the name of Dawson, and then dismissed it after he had filed the present bill in his own name. It was, therefore, his own fault if he sustained any harm, either by the institution or dismissal of that suit. It was competent for Weaver to set up all the defences he could to that bill, and it is quite clear, that by asserting in his answer to that suit, that he was liable only to the party entitled to the surplus, he is not estopped from pleading limitations to this. Then as to the acts and conduct of Dawson. In the insolvent case, Weaver, in opposition to the complainant, who was represented by able counsel, claimed the surplus proceeds of the sale of the property then in the hands of the trustee, and also filed a claim as creditor of the insolvent. Dawson appears to have acted, with other counsel, for Weaver in the assertion of these claims, and this is all these records show he did, except to allow his name to be used by the complainant in filing the bill of July, 1870. In all this we discover nothing to justify the inference that there was any collusion between Dawson and Weaver to defeat the complainant's claim to these rents and profits, or to hinder or delay him in instituting a suit therefor in his own name. Finally the insolvent proceedings show, that the property was sold by the trustee, on the 15th of June, 1868, and, as it was purchased by a third party, we infer that Weaver was then turned out of possession. It was sold for \$4500, and the amount of debts returned by the insolvent upon his application, in May, 1864, was only \$1329. It was therefore, quite apparent, at that time, that it would not require the additional sum of \$5000, or \$6000, to be derived from the collection of these rents, to pay the debts of the insolvent in full, principal and interest. The complainant could have safely brought his suit

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Weaver vs. Leiman.

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immediately after this sale, even if it would have been difficult for him to have asserted his rights before.

In short, we find nothing in any, or all of these objections combined, to affect the running of limitations. Mere doubt as to the right, or difficulty in the way of its assertion, will not do. Apart from the savings and disabilities expressed in the Statute itself, there must, in order to defeat its operation, be some insuperable barrier, or some certain and well defined exception clearly established by judicial authority. In *Green vs. Johnson*, 3 G. & J., 394, the Court expressed in very strong terms its disapproval of all attempts to remove the safeguards, and fritter away the provisions, of this most important Statute, by judicial refinements and subtile exceptions, or to increase the number of interpolations or constructive innovations that have already been engrafted upon it.

The remaining, and main inquiry is, was the bill filed within three years after the disability of infancy was removed? It was filed on the 27th of April, 1872, and the question therefore, is, whether the complainant was, or was not twenty-one years old, prior to the 27th day of April, 1869? He relies upon the testimony of his mother, and the entries in the family Bible. The mother was examined in February, 1877. Her own age is not stated, but it appears she was the mother of seven children, that George, the complainant, was her second child, and that her husband, Conrad Leiman, died in May, 1868. In her examination-in-chief, she testified quite positively, that her son George would be twenty-nine years of age, the 20th of June next, that is, on the 20th June, 1877. This would make his minority terminate on the 20th of June, 1869, and save the bill by *one month and twenty-four days*. On cross-examination, however, she displays the usual infirmity of memory as to dates, and that too, as to the exact dates of events quite as important to her, and just as likely to be borne in remembrance, as that of the

birth of her second child. She could not tell when she was married, nor, with certainty, when any of her other children, except the two eldest, were born. Being asked how she was able to remember the date of George's birth, and whether she had refreshed her memory on this point, and if so, how? her reply is, "I remember his birth; I know what day he was born; *I have got it put down in a book at home, a German Bible.*" This Bible was afterwards produced before the commissioner, but it does not appear from the record to have been thus produced *upon the call* of the cross-examining counsel, so as to make it evidence offered by the defendant. The book itself is not before us, but the entries on the fly-leaf, stating the dates when six of the children were respectively born, have been copied into the record by agreement.

The authorities show that entries in a family Bible or Testament are *admissible* in evidence even without proof that they have been made by a parent or a relative; for as this book is the ordinary register of families, and is usually accessible to all its members, the presumption is that the whole family have more or less adopted the entries contained in it, and thereby given them authenticity. 1 *Taylor's Ev.*, sec. 585; *Hubback's Evidence of Succession*, 672. This Court has said, when the book is once shown to be the family Bible or Testament, the entries therein derive their *weight* as evidence not more from the fact that they were made by any particular person, than that being in that place as a family registry they are to be taken as assented to by those in whose custody the book has been kept. *Jones vs. Jones*, 45 *Md.*, 144. It is certain, however, that such a registry is not, in all cases, *conclusive* of the facts stated, but its weight as evidence is subject to be weakened or strengthened by all the proof in reference to it. The party by whom the entries were made, when they were made, whether the book has been so kept as to be accessible at all times to all the members of the family,



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Weaver vs. Leiman.

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are all matters to be considered in determining the *probative force* of such evidence. On all these points the testimony of the mother is very important. While she states that this Bible was bought by her husband, had been in the family twenty or thirty years, and that the entries therein were according to her knowledge of the facts, she admits they were not made by her husband, but by some one who could write English. She does not know *when* they were made but thinks they were *all written at one time*. During her husband's life he kept the book up stairs, sometimes in a table, and sometimes in a bureau in his own bed-room, and since his death she has kept it in her bureau. Now if these entries were all made at one time, it is apparent upon their face that the entry as to the birth of George must have been made more than *twelve*, and that of the eldest child more than *fifteen* years after the dates of their respective births as therein recorded. Again, there is no record whatever of the birth and death of an infant who was next to the youngest of the children. These facts, if they are not sufficient to exclude these entries altogether, and render them inadmissible in evidence (a point that need not be decided) must greatly weaken, if not destroy their weight and force.

Against this proof the defendant has produced entries of the *baptisms* of the two eldest children and of the *marriage* of their parents, taken from the records of Zion Church, a German Lutheran Church in the City of Baltimore. These entries are in the form of certificates by the Rev. H. Scheib, certifying that he performed the several ceremonies therein stated. There was no law requiring such records to be kept, but we are clearly of opinion they are admissible in evidence, and it has been so decided by unquestioned authority. In the case of *Kennedy vs. Doyle*, 10 Allen, 161, where the issue was, the infancy *vel non* of the defendant at the time the contract sued on was

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Weaver vs. Leiman.

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made, the question was elaborately considered, and it was there decided that the entry of the baptism of the defendant, made by a Roman Catholic priest, in the discharge of his ecclesiastical duties, is competent evidence, after his death, of the date of baptism, if the book is produced from the proper custody, although he was not a sworn officer, and there was no law requiring such a record to be kept. In *Blackburn vs. Crawford*, 3 *Wallace*, 175, the Supreme Court decided that a similar entry in the baptismal register of St. Patrick's Church in the city of Washington, was admissible to prove the fact and date of the baptism of the child, upon the ground that the entries in the register were made by the writer in the ordinary course of his business. Such entries, however, are ordinarily admissible only for the purpose of proving the fact and date of baptism, and of no other matters therein stated, such for instance as the date of the birth of the child, because the fact and date of baptism are the only facts necessarily within the knowledge of the party making the entry. The principle upon which these entries are admitted for such purpose, is the same which governs the admission of entries after his death by a clerk, agent, attorney or other disinterested person, made in the regular course of business, and when he had no interest in stating an untruth. *Reynolds vs. Manning*, 15 *Md.*, 510; *Romer vs. Jaacksch*, 39 *Md.*, 588. As was said in *Kennedy vs. Doyle*, "an entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor, or a physician, in the course of his secular occupation." In the cases referred to the priests who made the entries were dead at the time they were offered in evidence, and the same authority, (10 *Allen*, 165,) shows that had the priest been still alive, the records would not have been admissible in evidence "*unsupported by his testimony.*" Here the Rev. Mr. Scheib, the clergyman who performed

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Weaver vs. Leiman.

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these ceremonies, was alive and was not examined as a witness. But the agreement of counsel, as we understand it, supplies the requisite support of his testimony. By that agreement "the marriage and baptismal certificates furnished by the Rev. H. Scheib, are admitted, as if proved under the commission *by him*—all this subject to all just exception—that is to say, that the *contents* of the certificates furnished, are truly *extracted from the church records*, to have the same effect as if regularly proved as such extracts under the commission, and that Scheib now is, and then was, the pastor of said church, *and was the officiating clergyman at the ceremonies he so certifies to.*" We think it is plain that the purpose, as well as the effect of this agreement was, to dispense with the calling of this clergyman to prove that he performed these ceremonies at the respective dates stated, and made contemporaneous entries thereof in the church records, in the due course of his clerical duties, and to admit that such were the facts. Besides this, the mother testifies that she was married, and that these two children were baptized by the Rev. Mr. Scheib.

These entries or certificates must therefore be received as evidence, and it is very clear that entries thus made at the time by a clergyman in the regular discharge of his duty, are far more reliable, and entitled to much greater weight than the imperfect recollection of the mother as to dates, supported as it is only by the entries in the Bible, which we have shown were made many years after the events. In fact, there is little ground for supposing they are not absolutely correct as to the dates of the ceremonies thus recorded. Now what do they show on their face, and in connection with the testimony of the mother? They show that the complainant was baptized on the 29th of October, 1848, and the mother says, that at the time he was baptized, she believes he was about two years old, and "*knows that he was walking about;*" and again she is "*quite*

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Weaver vs. Leiman.

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*certain*" her second child was born within three years after her marriage, and the marriage certificate shows she was married in the year 1843. From these facts the conclusion is irresistible that the complainant was twenty-one years of age prior to the 27th of April, 1869. But the utter inaccuracy of the entries in the Bible is demonstrated by the fact that the baptismal certificate shows that Emma, the eldest child, was baptized on the 15th of September, 1844, while the entry in the Bible states that she was born on the 15th of June, 1845. In this state of proof the Court is bound to reject the inaccurate entries in the Bible, and the defective memory of the mother, and to rely upon the proof afforded by the baptismal and marriage certificates, in connection with the testimony of the mother as to facts about which she could not well have been mistaken. We therefore determine that the plea of Limitations is a bar to this suit.

It was also proved that in September, 1866, the complainant appeared before the Register of Voters in the District of Anne Arundel County, in which he then resided, and in accordance with the provisions of the Registration Act of 1865, ch. 174, made oath that he was, or would be twenty-one years of age at the then ensuing November election. It also appears from the record in the insolvent case, that he was examined as a witness on the 9th of January, 1869, and swore that he was then twenty-one years of age. But we concede that very little credit, even if he is competent so to testify, can be given to an affidavit of a party himself, as to his own age, made at or about the period when he is supposed to have attained the age he swears to. Apart, however, from these affidavits, which may possibly tend to support the conclusion we have reached, the other proof to which we have adverted is quite sufficient, and we rest our decision upon that.

The result is, that the decree appealed from, which directs the defendant Weaver to account with the com-

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Conner, Ex'rx *vs.* Waring, *et al.*

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plainant, of and concerning the rents and profits of this property, must be reversed and the bill dismissed.

*Decree reversed, and  
bill dismissed.*

(Decided 28th January, 1880.)

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ELEANOR F. TORRANCE CONNER, Executrix of LOUISA  
TORRANCE *vs.* RACHEL WARING, and others.

*Testamentary construction—Life estate—Right conferred to dispose of the Remainder—Execution of a Power—Party taking under the Power, takes under the Donor of the Power—Estate limited to Trustees—Devise in execution of a Power to Trustees—Legal fee Vested in Trustees and the heirs of the Survivor—Determinable fee—Estate vested, by way of Reverter, in the Heirs-at-Law of the original Donor of a Power—Parties entitled to claim an Estate becoming vested by way of Reverter—Distribution of a Trust Fund.*

C. T. devised all his estate to E. T., his wife, for life, with power to dispose of the same among all or such of his "children, or their issue, in such manner and proportion, and for such term and estate as she shall think fit," the shares designed for his daughters to "be secured to them for life, free and clear of any control of their respective husbands, or without being liable to the payment of their debts, and after their decease, for the benefit of their children, and their legal representatives, in equal proportions, forever." In pursuance of this power, E. T., the wife, by will, disposed of the whole estate, dividing it into eight equal parts, giving one share in fee to each of the three sons, one share to trustees, in trust for each of two married daughters, and then devised one share to trustees, in trust, to permit each of the three unmarried daughters, during her natural life, to have, hold, &c., the same, and receive the rents, &c., thereof, free from the control of any future husband, and without being liable for his debts; "and from and immediately after the decease

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Conner, Ex'rx vs. Waring, et al.

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of" each, "then, *in trust*, that the said share shall become the estate of all" her children, to "be equally divided between them, their heirs," &c., "forever, as tenants in common, share and share alike;" and then provided that "in the event of the decease of any of her aforesaid daughters, without leaving any child or children, or descendants of such child or children," her or their share should "descend to, and be equally divided between, all" her "surviving children, and their respective representatives, as tenants in common, share and share alike." A son and three daughters, died unmarried and without issue; two sons and two daughters died, each leaving issue. A certain fund raised from real estate devised by C. T. and E. T., his wife, had been held in trust for L. an unmarried daughter, to whom the interest or income therefrom had been paid during her life. L. died leaving a will, whereby she devised and bequeathed the whole of her estate, save a small pecuniary legacy, to the children of a deceased brother. Upon a question as to the proper mode of distributing the fund which had been held in trust for L. it was HELD:

- 1st. That the devise by C. T. to his wife E. T. was for her life only; but by the power in his will he clothed her with authority to dispose of the remainder of the estate among all or such of his children, or their issue, in such manner and proportions, and for such term and estate as she might think fit.
- 2nd. That until this power was exercised, the reversion in the fee remained in the heirs-at-law of the testator; but when the power was executed, by the will of the wife, the estates created thereby, took effect in the same manner as if they had been created by the will which raised the power.
- 3rd. That the party taking under and by execution of the power, took under the donor, and in like manner as if the power, and the instrument executing it, had been incorporated in one instrument.
- 4th. That consequently, the estate created by the execution of the power, in trust, for the life of the daughter L., with remainder in fee to her unborn children, would, but for the estate limited to the trustees, have left the reversion in the heirs-at-law, of the donor of the power, dependent upon the event of L. having issue.
- 5th. That the devise by the mother in execution of the power, to two trustees and the survivor of them, and the heirs of the survivor, in trust, &c., for L., the daughter, taken in connection with other portions of the will as manifesting the intent, clearly vested the legal fee in the trustees and the heirs of the survivor; but it was

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Conner, Ex'rx vs. Waring, *et al.*

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a determinable fee, and, consequently as soon as the death of the equitable life tenant occurred, without having had issue to take the remainder, that event defeated and determined the estate in law conferred upon the trustees, and it became thence vested, by way of reverter, in the heirs-at-law of the original donor of the power.

6th. That this estate thus becoming vested by way of reverter, could only be claimed by those who could, at the time of such reverter, show themselves to be heirs of the original donor of the power; the intermediate heirs of such donor not having been so seized as to render them new stocks of inheritance.

7th. That the fund in controversy must be distributed into four equal parts, according to the contention of the appellees, and not into six as contended by the appellant, that is, one-fourth part should be paid to the heir or heirs of each of the two sons and two daughters who died leaving issue.

APPEAL from the Superior Court of Baltimore City.

Charles Torrance died in 1822, leaving a will duly executed to pass real estate, by which he devised to his wife, Elizabeth Torrance, during her natural life, the whole of his estate, real and personal, and then directed as follows: "And as to what shall become of it after her decease, I do hereby authorize and empower my said wife, Elizabeth, by deed, will or otherwise, to give, grant, convey, devise or dispose of my said estate unto and among all or such of my children, or their issue, in such manner and proportion, and for such term and estate as she shall think fit. Nevertheless it is my will, and I do order and direct, that the respective shares or portions designed for my daughters shall be secured to them for life, free and clear of any control of their respective husbands, or without being liable to the payment of their debts, and after their decease, for the benefit of their children and their legal representatives, in equal proportions, forever." The testator appointed his wife the sole executrix of his said will. He left surviving him three sons, viz., Charles, George

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Conner, Ex'rx *vs.* Waring, *et al.*

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and John Torrance, and five daughters, viz., Elizabeth, wife of Alexander Mitchell, Ann, wife of Andrew Clopper, Dorcas, Mary and Louisa Torrance. On the 30th of March, 1823, the widow, Elizabeth Torrance, executed her will, which, after reciting her husband's will, as above set forth, proceeded as follows: "Now I do hereby authorize and direct, that as soon as may be after my decease, the said estate, both real and personal, of my said late husband, Charles Torrance, as well as my own estate, of every description, shall be divided into eight equal parts, \* \* \* \* taking into view any sum or sums of money, or any other property in my books, that may be charged against my children, and charging them with the amount. As to the said several parts or shares I dispose thereof as follows." She then gave one share to her sons, Charles and George, in trust for her daughter, Elizabeth Mitchell, wife of Alexander Mitchell; another share to her said sons, in trust for her daughter, Ann Clopper, wife of Andrew Clopper. Then followed three separate clauses in respect to the three unmarried daughters, in exactly the same terms; the one in respect to Louisa Torrance is set out in full in the opinion of this Court. A share was given absolutely to Charles, one to George, and one to John Torrance. Then followed this clause: "Item.—In the event of the decease of any of my aforesaid daughters, without having any child or children, or descendants of such child or children, the part or share of the estate hereinbefore devised to her, or them, so dying, shall descend to, and be equally divided between all my surviving children and their respective representatives, as tenants in common, share and share alike. Nevertheless, I do hereby expressly order and direct, that the portions or parts that may thus descend to my surviving daughters, shall be held in trust for them respectively, by my said sons, Charles Torrance and George Torrance, and the survivor of them, and the heirs, executors and administrators of



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Conner, Ex'rx vs. Waring, et al.

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such survivor, for the like uses and purposes, and subject to the same limitations and restrictions, and to descend to their respective children, in the like manner as the shares of the estate hereinbefore devised for my daughters." The widow died in 1829, and a division of the estate was made in pursuance of the directions of her will. John Torrance died in 1832, intestate, leaving one son. Charles Torrance died the same year intestate, and without issue. George Torrance died in November, 1848, leaving a widow and four children. Mrs. Mitchell also died in the same month, leaving her husband and numerous children surviving her. Dorcas died on the 2nd of December, 1848, intestate, without issue, and without having been married. (*Vide Torrance vs. Torrance, et al.*, 4 *Md.*, 11.) Mrs. Clopper died in                    leaving children surviving her. Mary Torrance died in 1865, unmarried, leaving a will whereby she devised her entire estate, absolutely to her sister, Louisa Torrance. Louisa Torrance died in 1878, unmarried, leaving a will, whereby she devised and bequeathed all her right and estate, save a small pecuniary legacy, to her three nieces, children of her deceased brother George.

In June, 1878, a petition was filed in the case of *Torrance vs. Torrance, et al.*, by Eleanor F. Torrance Conner, as the executrix of Louisa Torrance, deceased, and James A. Conner, her husband, which alleged that under orders of the Court theretofore passed in said case, William H. Collins and George Hawkins Williams, as surviving trustees, had held as an investment of the funds of the above cause \$10,014.42, of Baltimore City six per cent. loan, for the use of Louisa Torrance for her life, with remainder to the parties entitled under the will of Charles Torrance the elder, deceased, and of his widow, Elizabeth Torrance, deceased, as construed and settled by the Court of Appeals in 4 *Md.*, 11. The petition charged that Louisa Torrance had recently deceased, unmarried and

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Conner, Ex'rx *vs.* Waring, *et al.*

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without issue, whereby the said remainder had become vested, and should be distributed as follows: One-sixth part thereof to Charles Torrance, of John, the complainant, one-sixth part to your petitioner, as executrix, as the part of Mary Torrance, deceased, who devised the same by her last will to the said Louisa, and of which will the said Louisa was sole executrix; one-sixth part thereof to your petitioner, as executrix of said Louisa, who was assignee of the share of the children of George Torrance, deceased, his sole heirs-at-law; one other sixth part to your petitioner as executrix, being the part which said Louisa held in her own right; one other sixth part to the children of Elizabeth Mitchell, deceased, or their representatives; and the remaining one-sixth to the children of Ann Clopper, deceased, or their representatives. To this petition an answer was filed by Rachel Waring, Ann Clopper, Amelia Clopper, and the trustee of Mrs. Mary Clopper, wife of Charles T. Clopper. This answer charged that the method of distribution suggested in the petition, was entirely erroneous, and averred that the property should be distributed in the following manner: One-fourth to Charles Torrance, the complainant; one-fourth to the heirs of George Torrance; one-fourth to the heirs of Mrs. Mitchell; and one-fourth to the heirs of Mrs. Clopper; and that as between the respondents themselves, Rachel Waring was entitled to one-fifth of one-fourth of said property; Ann Clopper to one-fifth of one-fourth; Amelia Clopper to one-fifth of one-fourth; the trustee of Mrs. Mary Clopper, wife of Charles T. Clopper, to one-fifth of one-fourth, and that the remaining one-fifth of one-fourth belonged to Mrs. Ann Cleves Wilkins, daughter of Mrs. Pleasants, deceased.

The Court, (DOBBIN J.,) passed an order on the 13th of November, 1878, directing the sale of the investment of \$10,014.42 of Baltimore City six per cent. stock, and the division of the proceeds of the sale into four equal parts,

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Conner, Ex'rx vs. Waring, et al.

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whereof one-fourth part should be paid to Charles Torrance, one-fourth part to the heirs of George Torrance, one-fourth part to the heirs of Mrs. Mitchell, and the remaining fourth part to the heirs of Mrs. Clopper. From this order the present appeal was taken.

The cause was argued before BARTOL, C. J. MILLER, ALVEY and IRVING, J.

*George Hawkins Williams*, for the appellant.

*Edgar H. Gans* and *Bradley T. Johnson*, for the appellees.

ALVEY, J., delivered the opinion of the Court

The only question presented on this appeal is, what is the proper mode of distribution of a certain fund, now in the hands of trustees, raised from real estate devised by the wills of Charles Torrance, and Elizabeth Torrance, his widow, and which had been held in trust for Louisa Torrance, late deceased, one of the children and devisees of the said Charles and Elizabeth.

The wills of both the father and the mother were construed by the Court of Appeals, in the case of *Torrance vs. Torrance, et al.*, 4 Md., 11; and while it is contended on both sides that the decision in that case has settled the principle that must determine the question raised in this, it is not agreed as to the true interpretation of that decision; and hence the controversy in this case.

In the case in 4 Md., 11, the controversy was in regard to the distribution of the share or proportion of the estate held in trust for Dorcas, one of the daughters, for life, who had died without child or children to take the remainder over; and here the controversy is in regard to the share of the estate held in trust for Louisa for life, who has also died without children to take the remainder under the devise.

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Conner, Ex'rx *vs.* Waring, *et al.*

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The three separate clauses in the mother's will, in execution of the power contained in the will of the father, in respect to the three unmarried daughters, Dorcas, Mary and Louisa, are in exactly the same terms, and with exactly the same limitations, the one as the others; and that in respect to Louisa is as follows: "One other part or share thereof, I give and devise to my said sons, Charles Torrance and George Torrance, and the survivor of them, and the heirs, executors and administrators of such survivor, *in trust*; nevertheless, that they, or the survivor of them, or the heirs, executors or administrators of such survivor, do, and shall permit and suffer my daughter, Louisa Torrance, during her natural life, to have, hold, use, occupy, possess and enjoy the same, and the rents, issues, interest, dividends and income thereof, to take, receive and enjoy, without being subject to the control, power or disposal of any future husband she may have, or liable for his debts, contracts or engagements. And from and immediately after the decease of the said Louisa, then, *in trust*, that the said share shall become the estate of all, and every the child or children she may have, and be equally divided between them, their heirs, executors, administrators and assigns, forever, as tenants in common, share and share alike. And in case any of her children shall die under age and without lawful issue, the part or portion of him, her or them, so dying, shall descend to, and become the estate of the survivors or survivor of them, the said children."

At the time of the decision of the former case, reported in 4 *Md.*, 11, of the eight children living at the death of the mother, in 1829, three only were living. Charles and Dorcas had died intestate and without issue; John, George and Mrs. Mitchell, had died leaving children; and Mrs. Clopper who was married and had children, and Mary and Louisa, who were unmarried, were the survivors. Since then Mrs. Clopper has died leaving children surviving

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Conner, Ex'rx *vs.* Waring, *et al.*

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her; Mary has died childless, devising all her property and estate to Louisa, and the latter has recently died, devising all her right and estate to the children of her deceased brother, George.

The Court of Appeals in the former case having said, that inasmuch as Dorcas had died without issue, and the remainder over, in default of issue, in that share was void, and therefore such share or part of the estate fell back to the estate of her father, the original testator, and descended as undisposed of property to his heirs-at-law, the appellant in this case contends, that upon the same construction, the share limited to Louisa for life, upon her death without issue, fell back into the estate of the original testator, and descends to his heirs-at-law, in the same manner; and as the share limited to Dorcas for life was distributed into six parts, so must be the share falling back and descending on the death of Louisa. On the other hand, the appellees contend, that the share in which Louisa had an equitable life estate, should be divided into four parts only; that is to say, one part to Charles Torrance, son of John; another part to the heirs of George; another to the heirs of Mrs. Mitchell, and another to the heirs of Mrs. Clopper; making the death of Louisa the point of time when to ascertain the heirs of the original testator who are entitled to take, upon default of issue to take the remainder over.

The devise by Charles Torrance, the elder, to his wife was for her life only; but by the power in his will he clothed this life tenant with authority to dispose of the remainder of the estate among all or such of his children, or their issue, in such manner and proportion, and for such term and estate, as she might think fit. Until this power was exercised, the reversion in the fee remained in the heirs-at-law of the testator. But when the power was executed, by the will of the wife, the estates created thereby, took effect in the same manner as if they had

been created by the will which raised the power. The party taking under and by execution of the power, took under the donor and in like manner as if the power, and the instrument executing it, had been incorporated in one instrument. *Co. Litt.*, 113, a; *Bradish vs. Gibbs*, 3 *John. Ch.*, 550; 4 *Kent Com.*, 337. This being so, the estate created by the execution of the power, in trust, for the life of the daughter Louisa, with remainder in fee to her unborn children, would, but for the estate limited to the trustees, have left the reversion in the heirs-at-law of the donor of the power, dependent upon the event of Louisa having issue. This was a limitation of a contingent remainder to future children, and until the remainder became vested, if the fee had not been placed in trustees, it would have remained in the heirs-at-law of the original testator. In such case, on the facts disclosed, there would have been good ground for the contention on the part of the appellant. For while it is an old and well established principle of the common law, in nowise affected by our statute regulating the course of descents, that the heir on whom the reversion is cast, subject to the life estate, is not so seized as to constitute him the *possessio fratris* or *stirps* of descent, if he died during the existence of the life estate, and that the person claiming as heir must claim from a previous ancestor last actually seized of the inheritance (*Co. Litt.*, 14 a; *Ratcliff's Case*, 3 *Co.*, 42; *Kellow vs. Rowden*, *Carth.*, 126; 2 *Com. Dig.*, tit. 29, ch. 4, secs. 1, 2, 3 and 4; *Jackson vs. Hilton*, 16 *John.*, 96; 4 *Kent Com.*, 385, 6); yet, while the estate is thus in expectancy, the intermediate heir, in whom the reversion may vest, may do acts, which the law deems equivalent to an actual seisin, and which will change the course of the descent, and make a new root of inheritance. Thus, he may by exercising acts of ownership over it, as by granting it for life, or in tail; or by devising it, or changing it, appropriate it to himself, and by that means change the course of descent.

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Conner, Ex'rx vs. Waring, et al.

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*Co. Litt.*, 15 a; *Stringer vs. New*, 9 *Mod.*, 363; 2 *Com. Dig.*, tit. 29, ch. 4, secs. 7, 8 and 9; *Cook vs. Hammond*, 4 *Mason, C. C. Rep.*, 485. Hence the devises of Mary and Louisa, embracing their interests in the reversion, as heirs of their father, would constitute them new stocks of inheritance in respect to such reversion; nor would it at all have varied the legal result as to the devise by Louisa, that she happened to be the devisee for life, upon the termination of whose particular estate the reversion fell into possession. See *Barnitz vs. Casey*, 7 *Cr.*, 170.

But this legal result, and for which the appellant contends, has been altogether defeated by the interposition of trustees to take the legal estate, instead of devolving it directly on the parties to take the beneficial estates under the power. As we have seen, the devise by the mother in execution of the power, was to two trustees and the survivor of them, and the heirs of the survivor, *in trust*, &c., to permit the daughter during her life, to have and to hold, &c., and to receive the rents and profits thereof, free from the control of her husband, &c.; and from and immediately after the decease of the daughter, "then, *in trust*, that the said share shall become the estate" of all her children, to be equally divided amongst them. This devise, when taken in connection with other portions of the will as manifesting the intent, clearly vested the legal fee in the trustees and the heirs of the survivor; but it was a determinable fee, and, consequently, as soon as the death of the equitable life tenant occurred, without having had issue to take the remainder, that event defeated and determined the estate in law conferred upon the trustees, and it became thence vested, by way of reverter, in the heirs-at-law of the original donor of the power. *Brownsword vs. Edwards*, 2 *Ves.*, 243; *Horton vs. Horton*, 7 *D. & East*, 652; *Shelley vs. Edlin*, 4 *Ad. & El.*, 582, 589. This estate thus becoming vested by way of reverter, can only be claimed by those who could, at the time of such

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Conner, Ex'rx vs. Waring, *et al.*

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reverter, show themselves to be heirs of the original donor of the power; the intermediate heirs of such donor not having been so seised as to render them new stock of inheritance. 4 *Kent Com.*, 387.

In deciding the case reported in 4 *Md.*, 11, the question as to the effect of the legal fee being in the heir or heirs of the trustee last deceased was not adverted to, and in the then condition of the parties, and their relation to the subject of controversy, it was wholly unnecessary. The result would have been the same, as the case then stood, whether considered in reference to the estate vested in the trustees or otherwise. Perhaps it was not exactly accurate to speak of the estate in which the daughter Dorcas had an interest, the remainder over in default of issue being void, as falling back to the estate of the original donor of the power, and descending as undisposed of property to his heirs-at-law. This, however, in no manner affected the result.

It follows that the fund in controversy in this case must be distributed into four parts, according to the contention of the appellees, and not into six, as contended by the appellant; and that the order appealed from must be affirmed.

*Order affirmed, and  
cause remanded.*

(Decided 28th January, 1880.)





# INDEX.

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## ACTION AT LAW.

In this State an action at law will not lie to recover a sum of money decreed to be paid by a Court of equity, within the same jurisdiction. *Boyle vs. Schindel*, 1.

*See* COVENANT.

## ACTION ON AN INJUNCTION BOND.

1. In an action on an injunction bond, proof was offered that the plaintiff was engaged in supplying his customers with milk, and kept a number of milch cows. His frame stable having become somewhat out of repair, was partially torn down in the summer of 1877, and he began to erect a brick stable in its place. In August of that year, he was stopped by the injunction, which continued till the 6th day of December following. After it was dissolved he went on to complete the building, and had it finished about the 25th of the same month. While the injunction was in force the plaintiff's cows were deprived of their accustomed and proper shelter, and were more exposed to the weather. The following question was then propounded to the witness: "What was the effect upon the cows if any, in consequence of being exposed to the wet and cold weather, because you could not finish the brick stable while the injunction suit was pending?" On objection by the defendants it was HELD:

That the question was pertinent and legal. *Lange and Appel vs. Wagner*, 310.

2. One of the grounds of special damage stated in the plaintiff's *narr.* was "the injury done to his cattle by exposure to the weather, requiring extra care and food, and causing their flow of milk to greatly decrease." HELD:

That such damage was one of the direct consequences of the injunction, for which the plaintiff was entitled to recover. *Id.*

3. The defendants offered evidence for the purpose of proving that the stable was built in part upon land belonging to the defendant L., on objection it was HELD:

1st. That it was not competent for the defendant to prove title to the property in this collateral way.

ACTION ON AN INJUNCTION BOND.—*Continued.*

2nd. That he was concluded on that question by the decision in the injunction case.

3rd. That the evidence by which it was offered to prove title was *ex parte* and inadmissible, being a survey and measurement of the ground made by a surveyor, not in the presence or by the authority of the plaintiff, or by any authority of law. *Id.*

4. By the prayers which were granted the jury were instructed that they might find for the plaintiff "in such damages, if any, as shall appear from the evidence that he has actually and necessarily or directly sustained by reason of the granting and serving of the writ of injunction," and "that actual, natural and proximate damages are such as are the direct necessary and natural result and effect of the act complained of, and from which injury is alleged to have been sustained." And a prayer of the defendants, which was granted, excluded from the computation of damages, all evidence of the rental value of the brick stable if it had been completed. **HELD:**

That these instructions left to the jury the question of the items and measure of damages in a way of which the defendants had no cause to complain. *Id.*

## ACTION ON THE CASE.

*See* ASSUMPSIT, 2.

## ACTS OF ASSEMBLY.

- 1715, ch. 28. For limitation of certain actions, for avoiding suits at law, 284.
- 1715, ch. 23, secs. 4, 5. Excepting certain persons from the benefit of the Act, &c., 294, 295.
- 1715, ch. 47. For quieting possessions, enrolling conveyances, &c., 611.
- 1766, ch. 14. Supplementary to the Act for quieting possessions, enrolling conveyances, &c., 611.
- 1825, ch. 156. Relating to illegitimate children, 593, 596, 599.
- 1895, ch. 380, sec. 3. Authorizing an appeal from an order granting an injunction or refusing to dissolve it, 447.
- 1847, ch. 153. Ceding to the United States of America, the jurisdiction over the site of the Naval School at Annapolis, 283, 290, 292.
- 1849, ch. 71. Incorporating the proprietors of Baltimore Cemetery, 640.
- 1849, ch. 229. Relating to devises, 596.
- 1852, ch. 340. To limit attachments in cases where laid in the hands of employers, 40.

ACTS OF ASSEMBLY.—*Continued.*

- 1854, ch. 23. Amending the Act limiting attachments in cases when laid in the hands of employers, 40.
- 1862, ch. 161. Defining the meaning of certain words in devises and bequests, 463, 466, 593.
- 1862, ch. 262. Relating to executions on judgments, &c., 38.
- 1864, ch. 15. To aid and encourage enlistments into the Maryland regiments in service of the United States, 399, 417, 418, 421.
- 1864, ch. 109. Relating to the competency of witnesses and the examination of parties, 687, 691.
- 1864, ch. 306. Relating to attachments on original process, 457, 459, 614, 615.
- 1865, ch. 32. Incorporating the Baltimore and Hampden Passenger Railway Company, 242, 243, 250, 251.
- 1867, ch. 167. To secure settlement with the County Commissioners of the several counties, and the Register of the City of Baltimore, for bounty funds, &c., 401, 424.
- 1867, ch. 223, sec. 2. Empowering a married woman, when a grantee in a deed of real estate or chattels real, to bind herself by a covenant running with said estate or chattels in the same manner as if she were a *fême sole*, 297, 306.
- 1867, ch. 341, sec. 2. Exempting certain property from taxation, 639.
- 1868, ch. 471, sec. 5. Requiring the president and directors of corporations to keep full, fair and correct accounts of their transactions, &c., 500, 510.
- 1868, ch. 471, sec. 56. Authorizing subscriptions to the capital stock of such corporations as have capital stock, to be made in land, &c., 516, 518.
- 1868, ch. 471, sec. 57. Requiring the books of any corporation receiving property in payment of stock, to be so kept as to show at all times fully what property was so received, &c., 502, 516.
- 1870, ch. 450. Relating to chancery jurisdiction, 669, 670.
- 1872, ch. 198, sec. 6. Authorizing an appeal to the Circuit Court for Charles County, in all cases arising under the Act, 368, 374.
- 1872, ch. 241. To protect oysters within the waters of Wicomico County, 44, 60, 61, 62.
- 1872, ch. 377, sub-ch. 16. Respecting the School Commissioners of Baltimore City, 443, 451.

ACTS OF ASSEMBLY.—*Continued.*

- 1874, ch. 45. Increasing the amount of the wages or hire of a laborer to be exempted under an attachment, 81, 40, 41.
- 1874, ch. 181. Repealing Article 71 of the Code of Public General Laws relating to oysters, as amended, &c., 44, 61.
- 1874, ch. 364. To amend section eight of Article four of the Constitution of the State of Maryland, 460, 462.
- 1874, ch. 483, sec. 8. Amending and re-enacting Article 81 of the Code of Public General Laws, entitled "Revenue and Taxes," 639.
- 1878, ch. 61. Relating to the awarding of Costs by the Court of Appeals, &c., 424.
- 1878, ch. 159. Repealing an Act to establish a free bridge over the Patapsco river, at or near the present site of Light street bridge, &c., 435, 437, 438.
- 1878, ch. 502. Regulating the time and manner of catching and taking fish and terrapins in that portion of the Potomac river between Maryland point, in Charles County, and Chisildine's Island, in St. Mary's County, &c., 368.

## ACTS OF ASSEMBLY, CONSTRUCTION OF.

1. The provisions of the general Act of 1874, ch. 181, relating to oysters, being inconsistent with, and repugnant to, the provisions of the special Act of 1872, ch. 241, entitled "An Act to protect oysters within the waters of Wicomico county," the two Acts cannot stand together, and the former must be construed as repealing the latter. *Willing and Mæick vs. Bozman*, 44.
2. In an action of assumpsit in which the Statute of Limitations was pleaded, the plaintiff replied: 1st. That at the time of the cause of action aforesaid accruing to him against said defendant, the said defendant was absent out of the State, to wit: within the territory ceded to the United States of America by the State of Maryland, under and by virtue of the Act of Assembly of said State, of the year 1847, ch. 158; and that this action was commenced within three years after the presence of said defendant within this State, and out of the aforementioned ceded territory. 2nd. That after the contracting of the said debt on the part of the said defendant, whereby the said cause of action accrued to said plaintiff, and within *three years* after, the said defendant absented himself from the State, whereby the said plaintiff was at an uncertainty of finding out said defendant or his effects; nor did the said defendant at the time of so leaving

ACTS OF ASSEMBLY, CONSTRUCTION OF.—*Continued.*

the State, leave effects sufficient and known for the payment of his just debts in the hands of any person who assumed the payment thereof to his creditors, and this action was brought within three years after defendant's return to this State; nor had the defendant been in this State for three years in all after the aforesaid cause of action accrued to the said plaintiff, at the time this suit was commenced.

On demurrer, it was HELD:

- 1st. That the power reserved to the State by the Act of 1847, ch. 158, to have its process served in the territory by that Act ceded to the United States for the Naval Academy, is valid and operative. .
- 2nd. That as process from the Circuit Court for Anne Arundel County could reach the defendant while residing there, he could not *pro tanto* be considered "out of the State" within the meaning of the Act of Limitations.
- 3rd. That the allegation in the second replication, that the defendant within three years from the accrual of the cause of action left the State, whereby the plaintiff "was at an uncertainty of finding the said defendant or his effects," was not a sufficient answer to the plea.
- 4th. That sec. 4, of Art. 57, of the Code, on which said replication was based, must be construed with reference to the time and circumstances under which the Act of 1715, ch. 28, from which it was codified, was passed, as set forth in the recital by way of preamble to the 4th sec. of that Act; and in subordination to well established rules in reference to Limitations.
- 5th. That the plaintiff could not, as attempted by the last part of the second replication, avoid the Act of Limitations by going into a calculation of time, showing that the defendant had not been within the State *precisely three years in all*, from the time the cause of action arose, to the time of suit brought. *Maurice vs. Worden*, 288.
8. Section 58 of Article 16 of the Code, before it was amended by the Act of 1870, ch. 450, provided that: "Whenever lands lie partly in one county and partly in another, or partly in a county, and partly in the City of Baltimore, or whenever persons, proper to be made defendants to proceedings in chancery, reside some in one county, and some in another, or some in a county, and some in the City of Baltimore, that Court shall have jurisdiction in which proceedings shall have been first commenced." A bill was filed in the Circuit Court of Baltimore City, where the defendants resided, alleging that

ACTS OF ASSEMBLY, CONSTRUCTION OF.—*Continued.*

certain land situated entirely in Baltimore County, could not be divided without loss to the parties interested, and praying for a sale of the same, and for a division of the proceeds arising therefrom. A decree was passed on the 19th of June, 1866, directing the sale of the land, and appointing trustees to make the sale. The land was sold and the sale reported to the Court; but the sale was afterwards set aside for cause. Before any further effort to sell was made, the Act of 1870, ch. 450, amending sec. 58 of Art. 16 of the Code, was passed. By this Act two provisos were added to the section. The first was as follows: "*provided*, that all proceedings for any partition of real estate, to foreclose mortgages on land, or to sell lands under a mortgage, or to enforce any charge or lien on the same, shall be instituted in the Court of the County or the City of Baltimore where such lands lie, or if the lands lie partly in one county and partly in another, or partly in one county and partly in the City of Baltimore, then such proceedings may be commenced in either county or in the City of Baltimore; but no sale or partition of lands under any such proceedings shall take place after the passage of this Act, except under the decree of a Court, as hereinbefore provided." It was insisted by two of the defendants that the last clause of this proviso, divested the jurisdiction of the Court which passed the decree, and rendered it inoperative and void. **Held:**

That the Act of 1870, ch. 450, was intended to be, and was prospective in its operation only; and could not be held to affect the rights of parties under a decree which went into effect before it was passed, or the powers of the Court to enforce such decree. *Johnson vs. Johnson, et al.*, 668.

*See* BOUNTY.

CORPORATIONS, 1, 3.

COVENANT.

EXECUTORS AND ADMINISTRATORS, 6.

LIGHT STREET BRIDGE.

WILLS, CONSTRUCTION OF, 5.

## ADULTERY.

Direct proof of adultery, that is, evidence of eye-witnesses, is not required, for such is the nature of the offence, and the secret and clandestine manner in which it is committed, that such proof is in most cases unattainable; yet where it is sought to be inferred from circumstances, they must lead to the conclusion of guilt by fair and necessary inference. *Kremelberg vs. Kremelberg*, 553.

## ADVERTISEMENT.

See SALE.

TRUSTS, TRUSTEES, &C., 4.

## AFFIDAVIT.

See MORTGAGE, &C., 6, 7, 8.

OWELTY OF PARTITION, 4.

## APPEAL.

Sec. 21 of Art. 5 of the Code, provides, that an appeal may be allowed "from any order granting an injunction, or from a refusal to dissolve the same, or an order appointing a receiver, the answer of the party appealing being first filed in the cause." HELD:

That a demurrer to the whole bill may be taken as an answer for the purpose of the appeal. *Mayor, &c. of Baltimore vs. Weatherby, et al.*, 442.

See ATTACHMENT, 3, 8.

PRACTICE IN THE COURT OF APPEALS, 4.

## ASSUMPSIT.

1. An action of *assumpsit* cannot be maintained to recover a sum of money promised to be loaned. *Conway vs. Log Cabin Perm. Build. Assoc'n of Baltimore*, 136.
2. Whether an action on the case for breach of contract, in not loaning the money promised, can be maintained. *Quære? Ib.*

## ATTACHMENT.

1. The recital in an attachment on judgment issued out of the same Court in which the judgment was recovered and remained of record, that the judgment had been recovered at a Court begun and held on the second Monday of *March* instead of the second Monday of *February*, is a mere clerical error which it is the duty of the Court to correct by ordering the writ to be amended. *First National Bank of Hagerstown, Garn. vs. Weckler*, 30.
2. When an attachment by way of execution is issued within three years from the date of the judgment, a clause of *scire facies* in the writ as to the defendant in the judgment, and notice to him are not necessary. *Ib.*
3. No appeal lies from a judgment refusing to quash an attachment. *Ib.*
4. Under the Act of 1874, ch. 45, if an employé contract a debt exceeding one hundred dollars, or has a judgment recovered against him for more than that sum exclusive of costs, his creditor may issue an attachment upon it, and that attachment may be laid in the hands of his employer, and if his



ATTACHMENT.—*Continued.*

wages or salary due at the time or that may accrue due before the trial, are in excess of one hundred dollars, then *such excess* shall be affected by the attachment, and shall be liable to condemnation. And if an employer as garnishee disregards such an attachment, and after it is laid in his hands and before trial, pays over the accruing wages or salary in excess of one hundred dollars to the employé, he does so at his peril. *Id.*

5. The record of a judgment on which an attachment was issued, showed that the verdict was rendered at November Term, 1875, and that a motion for a new trial was immediately made before the judgment was entered on the verdict. This motion was not disposed of until the following February Term, when it was overruled and judgment on the verdict was then rendered. The writ of attachment recited that the judgment was recovered at the February Term.

## HELD:

That no judgment could properly have been rendered until the motion for a new trial had been disposed of, and there was consequently no variance between the writ of attachment and the judgment. *Id.*

6. Certain bonds of T. held by A. for safe-keeping, were sold by A. and the proceeds used by him. With knowledge of the fact, T. accepted and retained a promissory note of A., and others sent him by A. for the amount of the value of the bonds sold, and collected the interest on said note for two years. Upon an attachment issued by T. against A. under the Act of 1864, ch. 306, to recover the value of said bonds, upon the ground that the defendant "fraudulently contracted the debt, or incurred the obligation respecting which the action was brought," it was HELD:

- 1st. That the acceptance of the note, under all the circumstances connected with it, created a new contract between the parties, and operated as an affirmance and ratification of the conduct of A.

- 2nd. That such affirmance and ratification with full knowledge of all the circumstances, operated as a waiver, and T. was estopped from afterwards charging that the act of A. was wrongful or fraudulent. *Troup vs. Appleman*, 456.

7. In an action of attachment under the Act of 1864, ch. 306, the defendant appeared to the short note case and pleaded in abatement that at the time of the institution of the action "there was on file on the Docket of the District Court of the

ATTACHMENT.—*Continued.*

United States of the District of Maryland, pending for trial, proceedings instituted by the plaintiffs against the defendant, upon the same debt as set forth in this case, for the purpose of having him adjudged a bankrupt." The defendant pleaded a similar plea, making the same averments to the writ of attachment. On demurrer it was HELD:

1st. That the plea in the short note case was defective in not averring the essential fact to the sufficiency of the plea, that the proceedings in bankruptcy were pending at the time of the plea pleaded.

2nd. That the plea in said case, it being an action *in personam*, was also defective because the simple pendency of the proceedings in bankruptcy constituted no cause of abatement of the action; and it was not alleged or pretended that the cause of action sued on had been *proved* as a claim in the bankruptcy proceedings and thus made subject to the provision of sec. 5105, of the Revised Statutes of the United States.

3rd. That although the debt be *provable* in bankruptcy, the most that could be insisted on, under sec. 5106 of the Revised Statutes, would be that upon the application of the bankrupt the action should be stayed to await the determination of the Court in bankruptcy on the question of his discharge.

4th. That if for any cause the proceedings in bankruptcy should terminate, or be closed without a discharge, the plaintiffs would be entitled to a judgment *in personam* against the defendant, and the latter would be liable, whether he be adjudged a bankrupt or not to pay that judgment out of any property that he might thereafter acquire.

5th. That the plea to the attachment case was defective in not making the essential averment that the Court in bankruptcy had taken cognizance of the petition filed by the plaintiffs.

6th. That in the absence of the necessary averments to show that the Court in bankruptcy had actually taken cognizance of the case, and assumed jurisdiction in the premises, and that the proceedings were still pending at the time of filing the plea, there was nothing shown to preclude the plaintiffs from proceeding against the property of the defendant by way of attachment. *Lewis vs. Higgins, et al.*, 614.

8. It was further HELD:

ATTACHMENT.—*Continued.*

1st. That a motion to quash the attachment because an attorney of the Court was one of the sureties in the attachment bond given by the plaintiffs, was rightly overruled.

2nd. That the rule of Court prohibiting attorneys from becoming securities for costs, or securities on appeal bonds, has no application to a case like the present. *Id.*

## AUDITOR'S ACCOUNTS.

*See PRACTICE IN THE COURT OF APPEALS, 2.*

## BALTIMORE CITY COURT.

*See LANDLORD AND TENANT.*

## BANKRUPT LAW.

*See TRUSTS, TRUSTEES, &c., 8.*

## BAPTISMAL REGISTER.

*See EVIDENCE, 11, 12.*

## BILL OF PARTICULARS.

*See PRACTICE, 12.*

## BLANK INDORSEMENT.

*See FRAUDS, STATUTE OF, 2.*

## BOUNTY.

1. The Act of 1864, ch. 15, authorized the Governor to offer a bounty to persons volunteering to serve as a part of the quota of this State in the armies of the United States; a portion of the amount to be paid at the time of being mustered into service, a portion at the end of each month of service for the five months immediately ensuing, and the balance at the expiration of the time of service or upon honorable discharge therefrom. By said Act the Commissioners for the several counties, and the Mayor and City Council of Baltimore, "upon forwarding to the governor *properly authenticated lists*, of volunteers mustered under this Act, in their respective Counties and the City of Baltimore, are hereby authorized and empowered *upon the certificate of the Governor* to draw upon the Treasurer for the sum or sums necessary to pay the cash and monthly payments to which *said volunteers* would be entitled as the same may become due, retaining in the Treasury the balance until the expiration of their terms of service." A large number of such lists duly authenticated by the proper military officials, and termed "Governor's Rolls," were forwarded to the Governor. Upon the receipt of each the Governor

BOUNTY.—*Continued.*

appended thereto his certificate, directed "To the Mayor and City Council of Baltimore," certifying the authenticity of the list, and that the volunteers mentioned therein, were properly to be credited to the City of Baltimore, and that "*you*" are entitled to receive from the Treasury of the State the amount specified in the certificate as required to make the cash and monthly payments to the volunteers named in the list; and that "*you*" are therefore authorized to draw upon the Treasurer of the State for said amount as per draft hereto annexed, which you will sign and present at the Treasury." Payment of such amount was in each case made upon a draft endorsed upon the certificate, and signed by "J. A. T., City Register," each draft stating that the amount drawn for was "required to make the cash and monthly payments to the" \* \* \* "volunteers within named under the provisions of the Act" of 1864. **HELD:**

That this action was in strict compliance with the provisions of the Act of 1864, by the terms of which the money so drawn from the treasury, should be applied *only* for the purpose of making the requisite payments to or for the benefit of the persons whose names should appear *on the list* thus forwarded to and certified by the Governor. *State vs. Mayor, &c. of Baltimore*, 898.

2. The same Act provides "That the County Commissioners and the Register of the City of Baltimore shall disburse the sums so coming into their hands, and *shall keep a record thereof*; but no County or the City of Baltimore shall draw for and be paid a larger sum than may be necessary for their respective quotas; and the several Counties and the City of Baltimore shall be liable to the State for any *misapplication* of the said funds by the County Commissioners or the City Register. In an action by the State against the Mayor and City Council of Baltimore, it was **HELD:**

- 1st. That it was competent as well as just for the Legislature to impose upon the Counties and the City of Baltimore liability for the default of such officers appointed by the Mayor and City Council, or elected by the people of the counties, as it might designate as the proper agents to disburse the said money in the mode and manner provided.

- 2nd. That disbursements to parties whose names do not appear on the "Governor's Rolls," or payment to the same person more than once, were *misappropriations* within the meaning of the statute for which the city was properly liable.

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BOUNTY.—*Continued.*

3rd. That whether payment should be made to each volunteer in person, or upon his order, and whether such order should be in writing, and how evidenced, were all matters intrusted to the discretion of the Register, and his decision thereon, if honestly made, was final. *Ib.*

8. By a resolution of the Mayor and City Council, the Register was authorized to employ an additional clerk to assist him in discharging the duty of disbursing said bounty money. This clerk, together with the Register himself, who made most of the disbursements, and his successor in office who made the rest, all testified to the effect that it was the invariable practice of the Register's office to require proper and sufficient powers of attorney, orders, or assignments, and in all cases of doubt to consult the City Counsellor; that such orders or powers of attorney were in all cases before them when disbursements were made thereon; and that in no case would any payment have been made without the production and existence of such vouchers. The testimony of these Registers and their clerk was corroborated by that of a large number of witnesses who had dealings with the office and to whom payments were made upon powers of attorney not produced in evidence. **HELD:**

1st. That this proof was sufficient to establish the fact, that vouchers which the Register in good faith decided to be sufficient to authorize payments thereunder, in cases where they had not been produced, and were alleged to be lost, once existed.

2nd. That the loss of these papers, and an unavailing and sufficient search for them in the places where they were kept, and where they ought to have been found if in existence, were sufficiently established by the proof to render the testimony of said witnesses admissible to prove the contents of these lost vouchers; and that under the circumstances of the case their contents were sufficiently proven, to justify the exoneration of the city from liability for the payments in dispute made thereunder.

3rd. That as the disbursements in controversy were all made under the provisions of the Act of 1864, the Register could not be required under the Act of 1867, ch. 187, to produce any different vouchers from those he was required by the Act of 1864 to keep. *Ib.*

## BUILDING ASSOCIATION.

*See* PRINCIPAL AND AGENT.

CAVEAT, CAVEATOR, CAVEATEE.

*See* ORPHANS' COURT, 1, 2, 3, 4, 5.

CEMETERY.

*See* CORPORATIONS, 7.

CERTIFICATE OF ACKNOWLEDGMENT.

*See* DEED, 2.

CERTIFICATE, OFFICIAL.

It is not essential to the sufficiency of a certificate given by the Clerk of a Court, that he should sign his full Christian name thereto. The signature of "E. W. Pearson, clerk of the Court of Common Pleas of Ross County, Ohio," is sufficient. *Harryman and Schryver vs. Roberts*, 64.

CERTIORARI.

*See* PRACTICE IN THE COURT OF APPEALS, 4.

CLERICAL ERROR.

*See* ATTACHMENT, 1.

CODE, CONSTRUCTION OF THE.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 2, 3.

EVIDENCE, 1.

LANDLORD AND TENANT.

MORTGAGE, &c., 6, 7, 8, 9.

ORPHANS' COURT, 1.

OWELTY OF PARTITION, 2, 3, 4.

PRACTICE IN THE COURT OF APPEALS, 5, 6.

TRUSTS, TRUSTEES, &c., 8.

CODE OF PUBLIC GENERAL LAWS.

ART. 5, SEC. 16. Authorizing a writ of procedendo, &c., 511.

ART. 5, SEC. 21. Specifying the cases in Courts of equity in which appeals may be allowed, 442, 447.

ART. 5, SEC. 27. Prohibiting objection in the Appellate Court to the jurisdiction of the Court below, unless such objection was made in said Court, 592, 596.

ART. 10, SEC. 36. Respecting the attachment of the wages or hire of any laborer or employé in the hands of an employer, 40, 41.

ART. 16, SEC. 23. Relating to deeds which have not been recorded agreeably to law, and the power of the Court in equity in respect thereto, &c., 486, 491, 498, 620, 626.

ART. 16, SEC. 58. Determining the jurisdiction of Courts in equity, where lands lie partly in one county and partly in another, &c., 668, 670.

CODE OF PUBLIC GENERAL LAWS.—*Continued.*

- ART. 16, SEC. 125. Relating to the sale of mortgaged property when suit is brought to foreclose the mortgage, 386.
- ART. 24, SEC. 19. Authorizing the recording of certain deeds or conveyances after the expiration of six months from their date, 485, 486, 490, 491, 493.
- ART. 24, SEC. 29. Requiring the oath or affirmation of a mortgagee, that the consideration of the mortgage is true and *bona fide*, to be endorsed on the mortgage, &c., 486, 488, 490, 583, 587, 620, 627.
- ART. 26, SEC. 52. Respecting the individual liability of the stockholders of a corporation, 500, 509.
- ART. 37, SEC. 35. Making the exemplification of a record under the hand of the keeper of the same, &c., evidence, &c., 77.
- ART. 37, SEC. 47. Allowing the public or private statutes of the United States, &c., to be received as evidence, from the printed volume of the same, 76.
- ART. 37, SEC. 58. Making certified copies of certain records evidence, 606.
- ART. 45. (*Vide* Act of 1867, ch. 223,) 806, 807.
- ART. 47, SEC. 30. Respecting illegitimate children, and their right to take and inherit real and personal estate from their mother, 599.
- ART. 51, SEC. 14. Denying jurisdiction to justices of the peace in certain actions, 648, 660.
- ART. 57, SEC. 4. Denying the benefit of the Statute of Limitations to certain persons, 284, 294, 295.
- ART. 57, SEC. 5. Precluding certain persons from the benefit, of the Statute of Limitations, 291.
- ART. 93, SEC. 250. Authorizing issues to be sent from the Orphans' Court to a Court of law, for trial, 338, 346, 355, 687, 696.
- ART. 93, SEC. 305. Determining the estate to be taken under a devise of real property, where no words of perpetuity or limitation are used in the devise, 170, 599.

## COLLATERALS, SALE OF.

*See* CONTRACT, 1.

## COMMISSIONERS OF PUBLIC SCHOOLS IN BALTIMORE.

The bill charged that the Board of School Commissioners had advertised for sealed proposals for supplying one of the public schools with suitable heating apparatus, and, without laying said proposals (which included one made by the complainants,) before the Mayor, had placed them in the hands of a committee of said Board, who opened said proposals and awarded the contract to C. And this action of the Board was claimed to be illegal as in violation of Ordinance No. 64 of 1873. By that ordinance when city officers shall advertise for sealed proposals for any public work or contract, "*pursuant to existing ordinance or resolution,*" it is made the duty of such officer to lay the proposals received before the Mayor, who, with the Comptroller and Register, shall proceed to open them, and award in all cases to the lowest bidder of known capacity, responsibility, &c. HELD:

- 1st. That if there was no ordinance in existence at the time of the transaction in question requiring the Board of Commissioners of Public Schools to advertise for sealed proposals, such as those made by C. and the complainants, then there was no ground for the injunction.
- 2nd. That the subject-matter of the transaction impeached, was within the power and control of the Mayor and City Council, (Act of 1872, ch. 357, sub-ch. 16,) and even if it were conceded, that the ordinances in force at the time did not confer authority on the Commissioners of Public Schools to make the contract in question, still the injunction should not have gone against the Mayor and City Council.
- 3rd. That the whole subject-matter being completely within their control, in the absence of any legislative formality required, it was perfectly competent to them to have authorized or sanctioned the contract without a previous ordinance prescribing the formalities, and the agencies through and by which such contract could be made. *Mayor, &c. of Baltimore vs. Weatherby, et al.*, 442.

## COMMISSION TO TAKE TESTIMONY.

*See PRACTICE IN EQUITY*, 3.

## CONDITION PRECEDENT.

*See CONTRACT*, 8, 8.

## CONSTITUTIONAL LAW.

*See BOUNTY*, 2.

ESTOPPEL.



CONSTITUTIONAL LAW.—*Continued.*

LIGHT STREET BRIDGE.

REMOVAL OF CASES.

## CONTINGENT REMAINDER.

*See* WILLS, CONSTRUCTION OF, 1.

## CONTRACT.

1. An importing firm in order to obtain possession of several cargoes as they arrived, made contracts with their bankers, who held liens on the cargoes for acceptances under letters of credit, by which they pledged collateral securities, with power to the bankers to sell the same at any time, in case the firm failed to put them in funds to meet the acceptances when due. Part of the securities so pledged consisted of the firm's own notes, payable to their own order and endorsed by them in blank, and delivered to the bankers. The firm failed and executed a deed of trust for the benefit of their creditors. The bankers then, in pursuance of the power sold the notes and applied the proceeds in part payment of the firm's indebtedness to them for the acceptances which they had to pay. A Court of equity then assumed administration of the trust created by the deed. **Held:**
  - 1st. That these contracts having been made in good faith, are valid, and the bankers can prove under the deed, for the balance of their claim, and the purchasers of the notes having purchased in good faith, can prove for the full amount thereof.
  - 2nd. That the subsequent failure and insolvency of the firm, and the execution of the deed of trust, did not prevent the carrying out of these contracts or take from the bankers any rights they held under them.
  - 3rd. That as the power to sell at any time was expressly given by the contracts, the right of the purchasers to prove under the deed for their full amount, was not affected by the fact that they purchased the notes after maturity. *Trust Estate of Woods, Weeks & Co.*, 520.
2. The right of parties to contract as they please, is restricted only by a few well defined rules, and it must be a very plain case to justify a Court in holding a contract to be against public policy. *Id.*
3. V. contracted in writing with G. and M. to do certain work in the improvement of Jones' Falls, for five thousand dollars. The work was to be done in accordance with certain plans and specifications adopted by the authorities of Baltimore City, and to the satisfaction of the City Commissioner. It

CONTRACT.—*Continued.*

was also agreed between the parties that the City Commissioner should make monthly estimates during the progress of the work, and upon the estimates thus made G. and M. were to pay V. eighty per cent. of the contract price, the remaining twenty per cent. to be paid on the completion of the whole work. V. having performed a part of the work, notified G. and M. in writing, that unless payment was made by a day specified, for what had been already done, he would abandon the work. No monthly estimates were made by the City Commissioner during the progress of the work, because in his judgment, the work had not been performed in accordance with the plans and specifications, and G. and M., therefore, refused to make any payments. V. thereupon abandoned the work and sought employment with other persons. Subsequently upon being notified by G. and M. that they had made a contract with other parties for the completion of the work begun by him, V. offered to resume the work. This offer G. and M. refused; V. thereupon sought to recover under a *quantum meruit* for the work done by him. **Held:**

- 1st. That the monthly estimates to be made by the City Commissioner, were by the very terms of the contract, a condition precedent to the right of V. to demand payment during the progress of the work.
- 2nd. That V. was not justified in refusing to perform the contract, upon the refusal of G. and M. to accede to his demand for payment for the work actually done.
- 3rd. That V. having, voluntarily and without excuse, abandoned the work, could not recover for the work done by him in part-performance of the contract.
- 4th. That G. and M. being obliged by their contract with the City authorities to complete the entire work, by a given time, had a perfect right, upon the voluntary abandonment by V. of his contract, to employ others to finish the work begun by him. *Gill and McMahon vs. Vogler*, 663.
4. Under a contract for the sale of lands where the purchase money is payable in instalments, if the vendee pays part and then rescinds the contract, he cannot recover back what he has paid, the vendor being ready and willing to perform on his part. *Davis vs. Hall*, 678.
5. But if the vendor be the party who rescinds the contract, he cannot hold on to any part of the consideration he has re-

CONTRACT.—*Continued.*

ceived under it, and what has been paid may be recovered by the vendee. *Ib.*

6. Where the contract itself provides what *shall be done* with the land in case the vendee fails to pay the instalments, the vendor cannot treat his failure to pay as a total rescission of the contract by the vendee. *Ib.*
7. In such case both parties are bound by its terms, and any rights which the contract gives to the vendee in the proceeds of the sale to be made by the vendor upon the vendee's failure to pay, are still reserved to the latter. *Ib.*
8. It was verbally agreed between A. and B. that A. should do the plumbing and gas-fitting in ten houses of B. for the sum of \$2050. Subsequently another contract was verbally made between the parties, that A. should take a certain house of B. at the price of \$1200, subject to a certain mortgage resting on it, in part payment of the work, and the balance only in money. The work contracted for was all done, and some extra work besides, all of which was satisfactory. It was in evidence that an appointment was made for a settlement, and that A. directed certain attorneys to examine the title, and prepare a deed for the house, which was done, and he paid for its preparation. The deed was executed by B. and left with the Justice of the Peace who took the acknowledgment, for A. who called to get it, but declined to receive it, because certain tax receipts had not been left with it, and for no other reason; of this refusal or the reason for it, B. had no notice. A. testified that all the taxes were to be paid by B. before he was to take the property, and B. admitted he was to pay the taxes in arrear, but did not understand it was a condition precedent to the consummation of the agreement. Subsequently to the execution of the deed, and its being left with the justice for A., the parties met and settled for the work done. The price of the house was deducted from the gross cost of the work done, and the cash or its equivalent was paid for the residue, and A. executed a receipt in full. At that time, A. asked for the tax bills and receipts, and B. promised they should be sent to him. At the time of the settlement, B. gave A. an order on the tenant of the house for the rent; and for fourteen months thereafter, A. received the rent from the tenant, and paid one year's ground-rent. Meanwhile the deed remained in the hands of the justice, and never was taken away; though B. was never notified thereof. A. in August, 1876, offered the house for sale at public auction.

**CONTRACT.**—*Continued.*

but it was not sold, the price asked for it not being bid. A. received the rents from the tenant till about July, 1877. A. testified that when he agreed to take the house, the mortgage resting on it, was stated to be \$1200; the deed which was prepared for him recited that it was subject to a mortgage of \$1250. A. stated that after the settlement and the receipt of the order for the rent, he examined the house, and found it did not come up to representation. He gave no notice, however, of exception either on account of its defects or of the excess of the mortgage claim over the alleged representation. A. admitted that at the time of the bargain or negotiation, B. requested him to examine the house for himself, B. being notified by the mortgagee at one time that he had some difficulty in getting his mortgage claim fixed up by A. because of some unpaid taxes. B. paid them, and told A. who said it was "all right," and afterwards saw the mortgagee and promised to pay the interest. In an action of assumpsit by A. to recover from B. a balance alleged to be due, it was **HELD**:

- 1st. That assuming the facts stated, to be true, the contract for the purchase of the house had become an executed contract by the payment of the purchase money and the entry into possession and exercise of all the acts of ownership; so that it was wholly "extracted from" the operation of the Statute of Frauds.
- 2nd. That if the payment of the taxes were originally intended to be a condition precedent to the consummation of the arrangement, the evidence of the conduct of A. afterwards, was sufficient to warrant a jury in finding a waiver, under instruction from the Court; and the subsequent notice of taxes in arrear and of distress for the same, of which A. gave no notice to B. did not warrant his treating the contract as abrogated thereby.
- 3rd. That if A. had paid the taxes, he would, under their arrangement, have had a right of action against B., but he could not at that time repudiate the contract and abandon the house.
- 4th. That in order to make the contract for the sale of the house a binding one on A., it was not necessary that a deed should have passed; his acceptance of possession, and exercise of all the acts of ownership for so long a time, and the payment of the purchase money by his work, as was agreed, would have entitled him

CONTRACT.—*Continued.*

to a specific performance and to a decree for the execution of a deed to him; and *e converso*, B. was entitled to hold him to the contract, in the absence of fraud, of which there was no proof. *Bechtel vs. Cone*, 698.

## CORPORATIONS.

1. W., a stockholder in a private corporation was sued by F., also a stockholder, for the recovery under sec. 52, of Art. 26 of the Code, of the amount of a judgment which F. had recovered against the corporation. The defendant pleaded as a bar to the action, that F. as president of the corporation, did not keep a full, fair, and correct account of the transactions of the corporation as required by sec. 5 of the Act of 1868, ch. 471. That section requires that the *President* and *directors* shall keep "full, fair and correct accounts of their transactions," and shall annually prepare "a full and true statement of the affairs of the corporation, which shall be certified to by the president and secretary, and submitted at the annual meeting of the stockholders." On demurrer, it was HELD:
  - 1st. That even if the failure to comply with the provisions of said fifth section was owing entirely to the conduct of the President of the corporation, it could not have the effect of releasing either the corporation or its stockholders from the liabilities which the law had imposed upon them for the debts which it had contracted.
  - 2nd. That the facts stated in the plea may have been true, and yet they did not constitute a bar to the plaintiff's recovery. *Weber vs. Fickey*, 500.
2. The record in an equity proceeding was offered to show that D. & Son as mortgagees, had sold certain marble quarries to H., and that the corporation had been substituted as purchaser in the place of H. Receipts were offered of payments by the corporation to D. & Son, on account of the mortgage, and it was proven that 440 shares of the paid up stock of the corporation was issued to H. as the consideration of his agreeing that the corporation should be substituted as purchaser of the mortgaged premises. On exception to a prayer on the ground that there was no evidence tending to prove that there was any agreement that the corporation would accept from H. his interest in the quarries and pay all encumbrances thereon held by D. & Son, it was HELD:
 

That the above evidence tended to prove that there was such an agreement. *Ib.*

CORPORATIONS.—*Continued.*

3. On objection that the plaintiff was not entitled to recover because the President and directors of the corporation had not kept books, "so as to show at all times fully what property was received for said stock, at what value, and the number of shares of the capital stock issued for the same," as required by the 57th section of the Act of 1868, ch. 471, it was HELD:  
That this provision of said section is directory merely, and not essential to the validity of a subscription to the capital stock payable in property. *Ib.*
4. It was further HELD:
  - 1st. That as the *narr.* alleged that the shares of the plaintiff had been fully paid for, it was not necessary to allege *in what manner* they had been paid for, but the mode of payment was properly to be shown by the proof.
  - 2nd. That a prayer was bad because it assumed that a statement made by a party, was conclusive even as against his own positive evidence.
  - 3rd. That after issuing the 440 shares of stock to H. and becoming liable to pay the purchase money for the quarry property as substituted purchaser, and receiving the property from H. neither the corporation nor a stockholder could be permitted to escape responsibility by showing that more was paid for the property than it was actually worth.
  - 4th. That it was not necessary in this action for the plaintiff to show what were the interests purchased by the corporation in the quarry property. *Ib.*
5. It is the settled law of this State, that the capital stock of a corporation is, for the purpose of taxation, the representative of its property, and the exemption of the one carries with it the exemption of the other. *State vs. Wilson, &c.*, 638.
6. An exemption from taxation exists only where it is expressed in explicit terms, and it cannot be extended beyond the plain meaning of those terms. *Ib.*
7. The charter of a Cemetery Company entitled to hold real and personal property, provided that the "land of the company dedicated to the purposes of a cemetery, shall not be subject to taxation of any kind." HELD:
  - 1st. That this embraces the land with the permanent improvements thereon, but not a fund invested in stocks, the interest of which is devoted to the maintenance of the cemetery.
  - 2nd. That its capital stock being, therefore, represented by non-taxable real estate, and taxable personal prop-

CORPORATIONS.—*Continued.*

erty, is taxable to the extent that the taxable element enters into and forms part of its value, and to that extent only. *Id.*

*See* EVIDENCE, 7.

## COSTS.

*See* ATTACHMENT, 8.

PRACTICE IN THE COURT OF APPEALS, 6.

## COVENANT.

The second sec. of the Act of 1867, ch. 223, provides that "In all deeds hereafter made to married women of real estate or chattels real, it shall be competent for the grantee or lessee to *bind herself* and *her assigns* by any covenant running with or relating to said real estate or chattels real, the same as if she was a *feme sole*." A deed of lease to a married woman made subsequent to this statute contained her separate covenant to pay a certain annual rent for the demised premises, and all taxes thereon. In an action against her and her husband for the breach of her covenant, it was upon demurrer HELD:

- 1st. That the covenant to pay rent and taxes was one that runs with the land, and is embraced by the terms of the statute.
- 2nd. That the remedy upon such covenant is by action at law.
- 3rd. That the husband should not be joined as co-defendant. *Worthington vs. Cooke*, 297.

## DAMAGES.

1. A person lawfully passing along a street, who stops on the door sill of a house fronting on the street, for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted. *Murray vs. McShane*, 217.
2. Travellers on a street, have not only the right to pass, but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street, or doorways, or wantonly injure them. *Id.*
3. A ruined or dilapidated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch, or a pit-fall dug by its side. *Id.*

*See* ACTION ON AN INJUNCTION BOND, 2.

## DAMAGES, MEASURE OF.

See ACTION ON AN INJUNCTION BOND, 4.

DECEIT, 5.

LANDLORD AND TENANT.

## DEBTOR AND CREDITOR.

1. An assignment, professing to be for the benefit of creditors generally, of certain goods, stock in trade and other personal property contained a clause, authorizing and empowering the trustee "to carry on and conduct said business *in his discretion, for such time as in his judgment it shall be beneficial to do so*, or to sell all of said goods and stock in trade and property, *at such times, in such manner, and for such prices as he may deem proper*, and apply the proceeds," &c. HELD: That the certain effect of this clause would be to hinder and delay creditors; and as against them such provision rendered the deed void. *Jones vs. Syer*, 211.
2. Apart from the provisions of the insolvent or bankrupt laws, a debtor has the right, provided he acts in good faith, to prefer one creditor to another. *Trust Estate of Woods, Weeks & Co.*, 520.
3. Where property conveyed to trustees for the benefit of creditors has been sold, a judgment creditor who files her claim to obtain her proportion in a just distribution of the proceeds among the *bona fide* creditors, does not thereby become bound to assent to the payment of every charge made by the deed upon the property conveyed, whether just or unjust. *Reiff, et al. vs. Eshleman*, 582.

See ATTACHMENT, 6.

MORTGAGE, &c., 10.

OWELTY OF PARTITION, 2, 3, 4.

## DECEDENT'S ESTATE.

See EXECUTORS AND ADMINISTRATORS.

## DECEIT.

1. Whenever one person makes a false representation, knowing it to be false, with intent to induce another to enter into a contract, which, but for such representation, he would not have entered into, and he is thereby damnified, a case of fraud is made out, and an action will lie. *Buschman & Cook vs. Codd*, 202.
2. The representation to be material, must be in respect of an ascertainable fact, as distinguishable from a mere matter of opinion. A representation which merely amounts to a statement of opinion, judgment or expectation, or is vague and indefinite in its nature and terms, or is merely a loose



**DECEIT.—Continued.**

conjecture or exaggerated statement, is not sufficient to support an action. *Ib.*

3. An action was brought to recover damages, alleged to have been sustained by the plaintiff by means of false and fraudulent representations, made to him by the defendants, by which he was induced to purchase a half interest in the business of manufacturing artificial marble. **Held:**

That to entitle the plaintiff to recover, it was necessary for him to prove, that with a view to induce him to make the purchase, the defendants represented to him that the business was profitable, valuable and flourishing, and that they had at the time large outstanding contracts for work; that such representations were false in fact, were made with the fraudulent intent to cheat and deceive him; that in making the purchase, he relied on such representations, and would not have made it except upon the faith of the same; and that in consequence thereof he was misled and injured. *Ib.*

4. Whether the plaintiff under the circumstances of the case, was obliged in any manner to make inquiry in regard to the truth of the representations, *Quære?* *Ib.*
5. In an action to recover damages, alleged to have been sustained by the plaintiff by means of false and fraudulent representations, made to him by the defendants, by which he was induced to purchase a half interest in the business of manufacturing artificial marble, he is entitled to recover such damages as may have been the natural and necessary result of such false representations, not exceeding in amount the sum paid by him for such purchase, with interest. *Ib.*

**DECREE FOR THE EXECUTION OF A DEED.**

*See CONTRACT, 8.*

**DEED.**

1. A deed must speak for itself, and its obnoxious provisions cannot be aided, modified or explained by extrinsic evidence. *Jones vs. Syer*, 211.
2. The certificate of acknowledgment is not conclusive of the fact that a deed was actually signed and sealed by the grantor; the execution of a deed consists of acts of the party making the deed and who is affected by it. *Evans vs. Horan and Preston*, 602.
3. A deed of bargain and sale of real estate for a valuable consideration, duly acknowledged and recorded, is voidable only, and not absolutely void, by reason of the fact that the grantor was *non compos mentis* at the time it was executed. *Ib.*

DEED.—*Continued.*

4. Such a deed may be avoided by the heirs-at-law of the grantor; but they cannot do this at law in an action of ejectment, where possession under it has been held for a long period, and permanent improvements have been made upon the land by a *bona fide* possessor; they must assail it by a direct proceeding in equity, where the equities of the parties can be properly adjusted. *Ib.*
5. A grantee in a deed, absolute in form, though in fact intended as a mortgage, is, in the absence of any agreement to the contrary, liable as between himself and the grantor, to pay the taxes on the property accruing after the date of the deed. *Davis vs. Hall*, 673.

*See* DIVORCE, 1, 2.

MORTGAGE, &C., 10.

OWELTY OF PARTITION, 1, 2, 3, 4.

## DEMURRER.

*See* EQUITY PLEADING.

PRACTICE, 3, 5.

## DIVORCE.

1. Under the facts as stated in the opinion of the Court, it was held, that neither the delay on the part of the complainant in making his application for a divorce from his wife for infidelity, of which he had full knowledge for a long time previous, nor the execution of a deed of separation, nor the circumstances under which it was made, whether considered separately or together, constituted any bar to the divorce sought. *Kremelberg vs. Kremelberg*, 558.
2. Where in a deed of separation between husband and wife, the former with full knowledge of the latter's adultery, voluntarily covenants with her father, a party to the deed, to pay to her for her personal support and maintenance, a certain sum annually during his life, such covenant is not avoided by a divorce *a vinculo matrimonii* obtained at the instance of the husband; it may still be enforced. *Ib.*
3. Where a husband upon his application is divorced *a vinculo matrimonii* from his wife on the ground of her adultery, the care and custody of the children are properly awarded to the father. *Ib.*

## DRAFT.

1. E. L. living in Westminster, Maryland, sent to B. & Co., of Baltimore, a telegram dated April 27th, 1878, in the following words "you may draw on me for seven hundred dollars." The same was received about two o'clock p. m. the same

DRAFT.—*Continued.*

day, being Saturday. On the Monday following, April 29th, B. & Co. drew their draft in favor of themselves on E. L. for \$700, payable at sight. On the day of its date, the draft endorsed by B. & Co. was received by the F. Bank of Baltimore, and the amount thereof placed to the credit of the drawers upon the faith of the telegram and the authority thereby given, the same being shown to said Bank. The draft was sent to a Bank in Westminster for collection, and on the 7th day of May, 1878, was presented to E. L., who refused to pay the same, and it was protested for non-payment. In an action by the F. Bank against E. L. upon said draft, it was HELD:

- 1st. That the telegram of April 27th, cannot be deemed and treated as an acceptance of the draft.
- 2nd. That the suit could not be maintained as an action upon an accepted draft, nor could the plaintiff recover upon the general money counts. *Franklin Bank of Baltimore vs. Lynch*, 270.
2. The declaration did not allege an acceptance by the defendant, actual or implied, but the ground of the action as there stated was that the defendant authorized B. & Co., to draw a draft on him for \$700, and promised that he would pay the said sum to the holder of the draft on the presentation thereof to him the defendant. It then alleged that in pursuance of said authority, B. & Co. drew the draft payable at sight, that the same was endorsed by B. & Co., and passed to the plaintiff for value, and was received by the plaintiff upon the faith of the authority given to B. & Co., by the defendant. It further alleged the presentation of the draft to the defendant, and his refusal to pay the same. HELD:
  - 1st. That this did not constitute a count upon an accepted draft, but for the breach by the defendant of his contract to accept and pay a draft drawn on him by his authority; and was sufficient, and substantially averred a breach by the defendant of his implied promise to accept and pay the draft according to its tenor and effect.
  - 2nd. That the telegram must be construed as an authority to draw the draft payable at sight.
  - 3rd. That such an authority implies a promise to accept the draft upon presentation, and to pay it at maturity, that is to say, at the expiration of the days of grace, viz., three days after sight.

DRAFT.—*Continued.*

- 4th. That such authority to draw, and promise to accept and pay inures to the benefit of any *bona fide* holder of the draft who takes it on the faith of the promise.
- 5th. That the plaintiff being the *bona fide* holder of the draft was not affected by the state of accounts between B. & Co., and the defendant. *Id.*
3. The draft having been received by the plaintiff in Baltimore on the 29th of April, and presented to the defendant at Westminster for acceptance on the 7th of May, there was no ground for imputing laches to the plaintiff in presenting the draft for acceptance. *Id.*

EMPLOYER AND EMPLOYÉ.

*See* ATTACHMENT, 4.

EQUITY PLEADING.

A bill was filed by the complainant claiming to be a creditor of and a shareholder in the B. C. M. Co., a corporation under the laws of this State, alleging that the corporation was insolvent, and praying that its liabilities might be ascertained, and the shareholders ratably assessed towards the payment of said indebtedness. The bill further alleged that F., being the president of said corporation and the holder of unpaid shares of its capital stock, fraudulently obtained a judgment against the company, and afterwards brought suit against W., a shareholder, and as such individually liable for the debts of the corporation, and recovered judgment against him. In addition to the prayer for general relief, the complainant prayed that F., and L., his assignee, might be restrained from enforcing the payment of said judgment. On demurrer it was HELD:

- 1st. That the bill was not multifarious.
- 2nd. That the bill in so far as it prayed for an injunction was fatally defective, because it alleged that the company was indebted to the complainant on a promissory note secured by mortgage, and also upon a promissory note indorsed by the company, and the complainant had failed to file as exhibits with his bill either the notes, copy of mortgage, or any other evidences of said indebtedness.
- 3rd. That this defect was not waived by the demurrer, which admitted only the truth of the facts stated in the bill, so far as they were relevant and well pleaded.
- 4th. That the defect however only applied to the *special relief prayed*, namely to the injunction to restrain the

EQUITY PLEADING.—*Continued.*

judgment of F., and did not in any manner affect the general relief to which the complainant was entitled as a creditor and shareholder of the company.

5th. That the demurrer being general, applying to the whole bill, and good as to a part only, should be overruled. *Miller vs. Balto. County Marble Co., et al.*, 642.

*See* LIMITATIONS, STATUTE OF, 1.

## ESTOPPEL.

The complainants in their bill, alleged, that they were the owners of lots abutting upon D. street or M. avenue, between S. and B. streets in Baltimore County; that the bed of said street or avenue belonged to them, and that the same was a private way. That the defendants without their assent, and claiming incorporation under, and authority by, the Act of 1865, ch. 32, were laying a railway track along said street or avenue to the complainants' injury, without having condemned the right of way, or made any compensation to them for their interest in the soil and the damages incurred. The bill then prayed for an injunction. The answer admitted the complainants' title, but denied that the said street was a private way, and charged it to be a public street or highway, and a very important thoroughfare. It admitted the laying of the railway track, but alleged it was only a horse car railway, which their charter fully authorized, and the defendants disavowed and forever renounced all claim to place a steam railway on said street, and insisted, that the law was wholly within legislative powers. The admissions and proof, showed, that the street or avenue in question had been thrown open to public use, and had been accepted and used by the public for many years; that lots had been sold calling for said street, and that it had been used for many years as a thoroughfare for all the ordinary modes of transit.

## HELD:

- 1st. That the complainants were estopped from denying it was such street or highway for all the purposes for which it might be fairly inferred that the dedication was intended.
- 2nd. That the Legislature had the power to confer upon the defendants the right to construct and use a horse car railway on said street.
- 3rd. That it was not necessary to determine whether under said Act of 1865, ch. 32, a steam railway, if attempted to be laid, would be with out sufficient legal

ESTOPPEL.—*Continued.*

warrant, as the defendants were not laying claim to any such right, but were building a horse car railway only, and renounced all claim to lay any other.

4th. That it did not necessarily follow that said Act was wholly unconstitutional because something may be attempted under it, and may in the broad language of the Act seem to be covered by it, which the Legislature could not authorize. If the law will admit a construction which will justify that which was being done under it, and which by the terms of the law was clearly warranted by it, to that extent the law ought to be sustained.

5th. That the terms of the Act included the right to build a horse car railway, and such railway along a public street or highway, is not a new and additional servitude on the land. *Hiss and Wife, et al. vs. Baltimore and Hampden Pass. Railway Co., et al.*, 242.

See ACTION ON AN INJUNCTION BOND, 8.

ATTACHMENT, 6.

LANDLORD AND TENANT.

## EVIDENCE.

1. A book in two volumes published in 1860, entitled "The Revised Statutes of the State of Ohio" of a general nature, in force August 1st, 1860, and upon the title page of which appeared the following words in printing: "Published for the State of Ohio and distributed to its officers under the Act of the General Assembly, passed March 16th, 1860," is strictly within the meaning of sec. 47 of Article 37 of the Maryland Code which provides "that public or private statutes of any State may be read in evidence from any printed volume purporting to contain the statutes of the said State," and is therefore admissible in evidence to show the statute law of the State of Ohio. *Harryman and Schryver vs. Roberts*, 64.
2. An admission by a partner relative to a matter of partnership concern, binds his co-partner. *Id.*
3. Parol evidence is not admissible to contradict, vary, add to, or subtract from the terms of a written instrument. When parties have entered into a written agreement, it is only reasonable to suppose, that they have introduced into the written instrument every material term and circumstance; and, consequently, all parol testimony of conversations held between the parties, whether before, or after, or at the time of the completion of the contract, will be rejected. *Lazear vs. National Union Bank of Maryland*, 78.

EVIDENCE.—*Continued.*

4. An action was instituted by the appellee against the appellant to recover on the following guaranty of the latter, executed on the 3rd of February, 1870. "For value received, I hereby guarantee to the National Union Bank of Maryland, at Baltimore, all liabilities to said Bank, of Lazear Brothers, now existing, or which may hereafter arise, to the extent of twenty-five thousand dollars, I hereby holding myself liable to said Bank to that extent for all paper that may be held by the Bank, of Lazear Brothers, either as drawers or endorsers, in the same manner as if endorsed by me, I hereby waiving notice of protest of such paper." The defendant offered parol evidence for the purpose of raising and explaining a latent ambiguity in the guaranty—that there was more than one class of paper held by the Bank, to which the contract of guaranty might be applied, and contended, that the evidence was admissible to show, that the parties intended it to apply to, and cover only such paper as should be discounted by the Bank *for the benefit* of Lazear Brothers. **HELD:**

That there was no obscurity or ambiguity in the language employed, nor any uncertainty as to the subject-matter upon which the contract was intended to operate; that to the extent of twenty-five thousand dollars it covered *all* paper that might be held by the Bank, upon which Lazear Brothers were either drawers or endorsers; and that the evidence offered, which could have had no other effect than to limit and restrict the terms of the guaranty, and to show that the language used in it did not mean what it clearly and plainly expressed, was inadmissible. *Ib.*

5. In an action to recover damages alleged to have been sustained by the purchase of a half interest in the business of manufacturing artificial marble, which the plaintiff was induced to make by means of the false and fraudulent representations of the defendants, he testified on cross-examination, that he had sold such half interest for a house on Broadway, which was subject to a mortgage of \$1600, and that it was not worth the mortgage. This house together with a house belonging to his wife, he subsequently exchanged with one Gruman for a tract of land in Virginia. In reply to a question by the defendants, he denied having told Gruman that he had refused \$2250 for the Broadway house. The defendants then offered to prove by Gruman, that the plaintiff told him that he, plaintiff, had refused an offer of \$2250 for the house at public sale. **HELD:**

EVIDENCE.—*Continued.*

That such declaration or admission of the plaintiff was admissible in evidence. *Buschman and Cook vs. Codd*, 202.

6. The judgment sued upon was recovered by F., Junior, while the amended *narr.* named the plaintiff as F. It was nowhere alleged or proved that there were two persons bearing the name of F. so as to make the addition of "Junior" necessary to distinguish the one from the other.

On objection it was HELD :

That there was no such variance as to make the record of the judgment inadmissible in evidence. *Weber vs. Fickey*, 500.

7. It appearing that either no written evidence of the organization of the corporation ever existed, or that if it did, the writing had been lost, it was HELD :

1st. That in this state of the case, parol evidence of the organization was clearly admissible.

2nd. That entries in the stock book, and parol evidence offered in connection therewith, were admissible for the purpose of proving that the plaintiff was the owner of shares of stock fully paid up at the time he became a creditor of the corporation, and that the defendant at that time was the owner of stock which had not been fully paid for. *Id.*

8. Entries in a family Bible or Testament are *admissible* in evidence even without proof that they have been made by a parent or a relative. *Weaver vs. Leiman*, 708.
9. But such entries are not in all cases *conclusive* of the facts stated ; their weight as evidence is subject to be weakened or strengthened by all the proof in reference to them. *Id.*
10. Who made the entries, when they were made, and whether the book has been so kept as to be accessible at all times, to all the members of the family, are all matters to be considered in determining the *probative force* of such entries. *Id.*
11. Entries in the baptismal register of a church made by the clergyman in the regular discharge of his clerical duties, are admissible in evidence, after his death, though there is no law requiring such records to be kept. *Id.*
12. Ordinarily such entries are admissible only for the purpose of proving the fact and date of baptism, and not of other matters therein stated, such as the date of the birth of the child. *Id.*

*See* ACTION ON AN INJUNCTION BOND, 1, 3.

BOUNTY, 3.

CORPORATIONS, 2.



EVIDENCE.—*Continued.*

EXECUTORS AND ADMINISTRATORS, 6.

INSURANCE, 4.

LAND RECORD BOOKS.

PARTNERS AND PARTNERSHIP, 6.

## EXECUTORS AND ADMINISTRATORS.

1. So long as the estate of a decedent is open, that is, not finally closed and settled, the accounts of the executor or administrator in the Orphans' Court, are subject to revision and correction in respect of any matter discovered to be erroneous. *Bantz, Ex'r vs. Bantz, et al.*, 686.
2. The simple passage of a claim against a decedent's estate by the Orphans' Court, or the passage and approval of an account retaining for it, does not establish the correctness of either. *Ib.*
3. The passage of a claim by the Orphans' Court, does not bind the executor to pay it; he may still resist it, and the claimant is put to his proof. *Ib.*
4. Parties interested in the distribution of a deceased's estate, may, in a proper way, and within a reasonable time, object to the propriety of a claim preferred by the executor of the deceased for services rendered her, in her life-time, although it has been passed upon and allowed *ex parte*, by the Orphans' Court, and included by the executor in his account. *Ib.*
5. An executor preferred a claim, in his own behalf, against his testatrix for services rendered her, in her life-time, and included it in his first administration account dated the 15th of December, 1874, which was passed, and approved by the Orphans' Court. The inclusion of this claim in his account gave the appearance of an overpayment of the estate. This over-payment was brought forward successively in each of the two following accounts as a matter for allowance. The third account was passed on the 27th of April, 1878, and within ten days thereafter, an application by parties interested in the distribution of the estate, was made for a revision, and to strike out. **HELD:**  
That this was a reasonable time within which to seek a correction of the errors and improper charges of the executor. *Ib.*
6. Parties interested as devisees under the will, in the distribution of the estate of a deceased person, are not excluded under the Act of 1864, ch. 109, and the supplements thereto, from testifying adversely to a claim made by the executor of the estate, which he seeks to have allowed, for services rendered his testatrix. *Ib.*

**EXECUTORS AND ADMINISTRATORS.—Continued.**

7. An executor cannot rightly claim to be allowed out of the estate of his testatrix, his mother, for the cost of renovating, and removing to another place, the tombstones of the grandparents of himself and other devisees under the will. *Id.*
8. To justify a claim against a deceased's estate for services rendered the deceased, it must appear that there was a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay, for the services. There must have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment. *Id.*
9. An executor may rightly claim to be allowed out of the estate of his testatrix for fertilizers furnished by himself, to her in her life-time. *Id.*
10. Where a farm, part of the estate of a deceased person, is, under the will, in the hands of her executor for sale, and is managed by him, and he charges himself with all the proceeds of the crops raised thereon, he is entitled to be allowed out of the estate for fertilizers used in their production. *Id.*

*See ORPHANS' COURT, 6.*

**EXECUTORY DEVISE.**

*See WILLS, CONSTRUCTION OF, 6.*

**FAMILY BIBLE.**

*See EVIDENCE, 8, 9, 10.*

**FEE SIMPLE ESTATE.**

*See LANDLORD AND TENANT.*

*WILLS, CONSTRUCTION OF, 5, 7.*

**FIRE INSURANCE.**

*See INSURANCE, 2, 3, 4.*

**FORFEITURE.**

*See INSURANCE, 1.*

**FORFEITURE OF CHARTER.**

*See PRACTICE IN THE COURT OF APPEALS, 8.*

**FRAUDS, STATUTE OF.**

1. Where the Statute of Frauds requires a contract to be in writing, to make it valid, it cannot be partly in writing and partly in parol. *Lazear vs. National Union Bank of Baltimore*, 78.
2. M. McD. S., the mother of G. G. S., wrote her name across the back of a single bill made by G. G. S. in favor of S. C. The indorsement was written about nine months after the date

FRAUDS, STATUTE OF.—*Continued.*

and delivery of the single bill. The payee sued M. McD. S. as upon a guaranty of the payment of the bill; and at the trial wrote over her blank indorsement the following: "In consideration of the loan of the money mentioned in the within single bill to my son, and in fulfilment of his representations to the payee that I would guarantee or become the surety for the payment of the money, and in consideration of the payee's promise and agreement not to press the payment of this single bill at its maturity, and to forbear suit thereon for two years or more; I hereby guarantee the payment thereof to the said S. C. should G. G. S. make default in payment thereof." In order to meet the defence taken by the defendant, that there was no sufficient writing to gratify the requirement of the Statute of Frauds, and that there was no sufficient consideration for the alleged undertaking, the plaintiff offered evidence for the purpose of showing that the contract as between himself and G. G. S. resulting in the making and delivery of the single bill was not complete and executed until the blank indorsement was placed thereon by the defendant; that the single bill had been made and delivered provisionally only, previous to that time; that it was contemplated from the beginning of the transaction that the defendant would become surety for the ultimate payment of the money loaned, and for which the single bill was given, and that the money was loaned upon that assurance and understanding as between the original parties to the single bill. **HELD:**

- 1st. That notwithstanding the parol evidence offered by the plaintiff, the Statute of Frauds presented an insuperable barrier, and he could not recover.
- 2nd. That the note being under seal the party placing her name upon the back of the note, could not be regarded as a joint obligor with the maker of the note, nor could she be regarded as an indorser in the ordinary sense of that term, which implies obligation to pay, as upon a negotiable note.
- 3rd. That the circumstances of the case all repelled the idea that there was anything inchoate or incomplete in regard to the binding effect of the note itself as between the original parties to it.
- 4th. That the blank indorsement having been placed upon the note nine months after its date and delivery, that indorsement, if it could have any effect at all, could only be effective as a guaranty.

FRAUDS, STATUTE OF.—*Continued.*

5th. That the mere blank indorsement of the defendant, a third party, on the single bill, could not be construed into such an agreement or note in writing as would gratify the Statute of Frauds, 29 Car. II, ch. 8, sec. 4; nor was the Statute gratified either in its letter or object, by the subsequent writing placed over the signature of the defendant by the plaintiff. *Culbertson vs. Smith*, 628.

*See* CONTRACTS, 8.

FRAUDULENT REPRESENTATION.

*See* DECEIT.

GUARANTY.

*See* EVIDENCE, 4.

FRAUDS, STATUTE OF, 2.

NATIONAL BANK, 1, 3.

HEIRS, DYING WITHOUT.

*See* WILLS, CONSTRUCTION OF, 6.

HORSE RAILWAY.

*See* ESTOPPEL.

HUSBAND AND WIFE.

1. Money received by a husband from the sale of his wife's real estate, made before the adoption of the Code, belongs to the husband absolutely, unless *at the time he received it* he promised the wife to repay it, and obtained possession of it upon the faith of such promise. *Sabel vs. Slingluff, &c.*, 132.
2. The receipt of money under such circumstances as would make the husband liable therefor, merely creates a *debt* due by him to his wife, and against such a debt the Statute of Limitations runs, and it will be barred unless sued for or claimed in due time after disability of coverture removed. *Id.*

*See* COVENANT.

ILLEGITIMATE CHILDREN.

*See* WILLS, CONSTRUCTION OF, 6.

INDEFINITE FAILURE OF ISSUE.

*See* WILLS, CONSTRUCTION OF, 5, 6.

INJUNCTION.

*See* APPEAL.

COMMISSIONERS OF PUBLIC SCHOOLS, &c.

EQUITY PLEADING.

PRACTICE IN EQUITY, 1.

PRACTICE IN THE COURT OF APPEALS, 3.

## INSOLVENCY.

1. The fact that a petitioner for the benefit of the insolvent laws is not actually insolvent, does not affect the validity of his discharge, nor oust the jurisdiction of the Insolvent Court. *Weaver vs. Leiman*, 708.
2. In such case the surplus remaining in the hands of the trustee, after payment of debts, belongs to the insolvent by way of resulting trust, and is not held by the trustee under any *express trust* for the benefit of the petitioner. *Id.*

## INSURANCE.

1. In contracts of life insurance, the time for the payment of interest on the premium notes, is of the very essence of the contract, and must be strictly complied with; and if by the terms of the policy, it is to become void upon a failure to pay such interest at the time specified, equity will not relieve against the forfeiture. *Knickerbocker Life Ins. Co. of N. Y. vs. Dietz*, 16.
2. An application for insurance, which was made part of the policy issued upon said application, stated that the applicants proposed to insure "our property which we describe as follows: No. 1 three thousand dollars on *stock in trade*, consisting of grain, *guano* and salt in forwarding house." The applicants bought and sold grain, guano and salt on their own account, they also sold fertilizers on commission. Certain fertilizers delivered to them for sale on commission, having been damaged by fire, the insured wrote a letter to the Insurance Company after the loss, in which, after stating that the owners of the fertilizers insisted that their fertilizers were covered by the policy, they say "*we do not think so.*" In an action upon the policy to recover for said loss, it was HELD:
  - 1st. That looking to the face of the policy and the nature of the business in which the plaintiffs were engaged, it was doubtful, to say the least, whether they intended to insure goods held by them on commission and for the loss of which they were not responsible; but the doubt, if any, was entirely removed by said letter.
  - 2nd. That if the intention did not exist when the policy was issued, it could not subsequently be imported into the contract.
  - 3rd. That the policy embraced only such stock in trade as belonged to the plaintiffs, and did not therefore embrace fertilizers consigned to them for sale on commission.

INSURANCE.—*Continued.*

- 4th. That whether the fertilizer belonged to the plaintiffs, or was held by them for sale on commission, was a question for the jury, to be determined under instructions by the Court.
- 5th. That if it was bought by the plaintiffs, or if they had become liable for it to the owners by course of dealing, it would be embraced in the policy.
- 6th. That the fact that the fertilizer was charged to them when delivered, with the understanding that they were to account for it at the price thus charged when sold, and if not sold it was to remain in their hands subject to the order of the persons from whom they received it, would not make the plaintiffs the owners of it, but on the contrary, they would under such circumstances still hold it as consignees. *Planters' Mut. Ins. Co. of Wash. Co. vs. Engle and Son*, 468.
8. Two agents of the defendant who were sent to inspect and ascertain the nature and extent of the loss, on being told by the plaintiffs that they were not certain whether the fertilizer in question belonged to them, or was held for sale on commission, requested the plaintiffs not to include in the proofs any fertilizers not in fact belonging to them, and that if this fertilizer proved to be the property of the plaintiffs, the defendant would pay for it. **HELD:**
- That if this fertilizer was omitted in the proofs of loss in consequence of what was thus said to the plaintiffs, such acts and conduct on the part of the defendant would amount to a waiver of proof of loss in this respect. *Id.*
4. At the time the policy was issued, the plaintiffs had fertilizers on hand but did not have any guano, and in the partial settlement of loss, the defendant paid the plaintiffs for all fertilizers which were admitted to be their property, and refused to pay for such as were held on commission. **HELD:**
- 1st. That it was clear that the plaintiffs meant the word "guano" to embrace fertilizers.
- 2nd. That it might fairly be implied that the defendant also understood the word as used in the policy in the same sense.
- 3rd. That a letter written by the Treasurer of the defendant to the plaintiffs, being but the written declaration of an officer of the defendant in regard to his construction of the policy, was not admissible in evidence as against the plaintiffs.

**INSURANCE.**—*Continued.*

4th. That if the proofs of loss were furnished in time, and such proofs were defective, and no objection was made to them by the defendant on that ground, but the refusal to pay was based on other grounds, the defendant would be considered as having waived all objections to the proofs on the ground of such defects, and would not be permitted to rely on them in a suit on the policy. *Id.*

**ISSUE, DYING WITHOUT.**

*See* WILLS, CONSTRUCTION OF, 6.

**ISSUES.**

*See* ORPHANS' COURT, 1, 2, 4, 5.

**JUDGMENT.**

*See* PRACTICE, 6, 7, 8, 9, 10.

**JURISDICTION.**

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 3.  
ORPHANS' COURT, 6.

**JURY.**

*See* ACTION ON AN INJUNCTION BOND, 4.  
INSURANCE, 2.  
NATIONAL BANK, 3.  
TRUSTS, TRUSTEES, &C., 1.

**JUSTICE OF THE PEACE.**

*See* LANDLORD AND TENANT.

**LACHES.**

*See* DRAFT, 3.  
TRUSTS, ACCEPTANCE OF, 2.

**LANDLORD AND TENANT.**

Property in the City of Baltimore was leased for the term of ninety-nine years, renewable forever. The leasehold interest became vested by mesne assignments in S. By proceedings for the sale of the real estate of S., a decree was obtained and a trustee was appointed to make the sale. This leasehold estate was included in the decree for sale, and was sold by said trustee to G. P. In the deed to G. P. it was spoken of as real estate, but by the special description of it in the deed and the references it was fully identified as this leasehold property. In the year 1852, G. P., supposing himself to be the owner of the fee, under said deed, (although in fact his estate then consisted of only seven years of

LANDLORD AND TENANT.—*Continued.*

unexpired leasehold with the privilege of renewal) executed a lease of the property for the term of ninety-nine years, renewable forever, and by mesne assignments the interest of his lessee became vested in J. S., who paid the rent to G. P. until the year 1877, when the term of G. P. was found to have long expired, and the reversioner's title and rights were discovered. J. S. then paid the reversioner a sum of money for arrearages of rent, and in consideration of a further sum, the fee was conveyed to him. J. S. afterwards refusing to pay the rent reserved in G. P.'s lease, the latter levied two distresses therefor. J. S. replevied the property distrained in each case before a justice of the peace. One justice decided in favor of J. S., and the other in favor of G. P. Both appealed to Baltimore City Court, where the judgment in each case was adverse to J. S. who paid the judgments and costs. In an action of trespass *q. c. f.* brought by J. S. against G. P., to recover for the entry thus made in making the distresses, and the payments to which he was constrained, it was HELD:

- 1st. That G. P. did not take a fee in the property under the trustee's deed to him.
- 2nd. That the description of the property in that deed was such as to identify it as the leasehold property which S. had bought by deed duly recorded; and the whole title being of record all the parties in interest were affected with notice; so that however ignorant G. P. was at the time he leased the property, of the exact nature of his estate, his lease did in fact operate no further than as an assignment of the residue of his term.
- 3rd. That J. S. was not estopped from denying the title of G. P. as his landlord, that title at the time of his so denying it having expired by effluxion of time.
- 4th. That his paying to the reversioner the arrearages of rent for the whole period of his holding under G. P. after the latter's title had expired, together with the rent for the time he repudiated G. P.'s title, was a recognition of the reversioner's right, and equivalent to an abandonment of possession under G. P.
- 5th. That the purchase of the reversion by J. S. was in self-defence, and G. P. had no superior right over him to buy it.
- 6th. That if G. P. had any equity under his lease, and was not barred by laches as against the reversioner, to have through a Court of equity his lease renewed, J. S. took the fee subject to that equity.



LANDLORD AND TENANT.—*Continued.*

7th. That J. S. was entitled to recover unless the judgments rendered against him in the replevin cases, growing out of the distresses, were to be regarded as adjudicating the question so as to prevent his recovery for the entry under the distress proceedings.

8th. That to render those decisions *res adjudicata* and as such an effective bar in a suit wherein the same matter was brought in issue, the tribunal making the decision must have jurisdiction over the whole subject-matter, and be competent to decide all the questions arising in the cause pertinent and important to the proper judgment in the premises.

9th. That under sec. 14, of Art. 51, of the Code, and the decisions of this Court, a justice of the peace had no power to determine whether G. P's title had or had not expired; and Baltimore City Court sitting as an appellate tribunal, though hearing the case *de novo*, had no more power or jurisdiction in that regard than the justice of the peace.

10th. That it made no difference, so far as this case was concerned, that it did not appear in the record of those proceedings, that this question was raised before the justices or in the Baltimore City Court.

11th. That a prayer by the plaintiff defining the measure of damages to be the amount of the judgments and costs on the distresses, was properly granted. *Prestman vs. Silljacks*, 647.

## LAND RECORD BOOKS.

1. As a general rule Land Record Books cannot be removed from the county of their origin, to be used as evidence in the Courts of other counties, but in one peculiar case they may be used in order to prevent wrong and injustice. *Evans vs. Horan and Preston*, 602.
2. Thus where the question of the execution *vel non* of a deed by a marksman, is legitimately raised, and the original is lost or not produced by him who claims under it, and the certified copy which he offers shows the mark was duly made, the other side may rebut this by the production of the Record Book itself. *Id.*

## LAPSE OF TIME.

*See* ORPHANS' COURT, 6.

TRUSTS, ACCEPTANCE OF, 2.

**LEASE.**

*See* LANDLORD AND TENANT.  
SECURITY.

**LEGISLATIVE POWER.**

*See* ESTOPPEL.

**LIFE ESTATE.**

*See* WILLS, CONSTRUCTION OF, 1, 5, 7.

**LIFE INSURANCE.**

*See* INSURANCE, 1.

**LIGHT STREET BRIDGE.**

The title of the Act of 1878, ch. 159, is "An Act to repeal ch. 220 of the Acts of 1876, entitled an Act to establish a free bridge over the Patapsco river at or near the present site of Light street Bridge, \* \* \* and to enact the following in lieu thereof." By this Act the Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, are "authorized, empowered and directed" to purchase the present bridge over the Patapsco river, known as Light street Bridge, and keep the same as a free bridge, if the owners will on or before the first day of January, 1879, agree to sell the same unto the said Mayor and City Council of Baltimore, and the County Commissioners of Anne Arundel County, at a price and upon such terms as to them may appear fair and reasonable. The Act further authorizes, empowers and directs them, if they cannot buy the said bridge to build a free bridge over said river, provided the whole cost "shall not exceed in the aggregate the sum of forty thousand dollars;" and provides for a keeper for opening and closing the draw, but makes no provision respecting the size or extent of the draw. By the 4th sec. the said Mayor and City Council, and the County Commissioners of Anne Arundel County are "authorized and directed," to levy on the assessable property of the city and county respectively, "at such time or times as they may deem best, such sums of money as may be necessary to carry out and secure the provisions of this Act, the expense thereof to be borne equally by said city and county, a portion thereof at least to be levied at their regular annual levy for the present year." On a mandamus filed in September, 1878, asking that said Mayor and City Council "may be compelled to levy a portion of the costs of carrying out the provisions of said Act, in accordance with the provisions of the said Act," it was HELD:

LIGHT STREET BRIDGE.—*Continued.*

- 1st. That the title of said Act was not defective under sec. 29 of Art. 3 of the Constitution.
- 2nd. That the direction as to the time within which or at which the first portion of the levy was to be made, was so far directory only that the defendant was not under compulsion to levy until after the exhaustion of efforts to buy within the period mentioned, and it was known whether it could buy or build within the sum designated by the Act.
- 3rd. That the proceeding was premature, and no mandamus should be awarded until it should appear, after the first day of January, 1879, that the defendant was wilfully disregarding the requirements of the Act of Assembly.
- 4th. That although the Act of Assembly, while it provides for a draw to the bridge, does not designate its size, it will not be held to have intended the construction of a bridge without a sufficient draw for the conveniences of navigation; and the said Act cannot be held void because of its interference with the rights of navigation. *Mayor, &c. of Balt. vs. Stoll*, 435.

## LIMITATIONS, STATUTE OF.

1. A bill to carry out the directions of a will for the sale of real estate, with prayer for general relief, is not a creditors' bill, and the filing of such a bill does not prevent the running of the Statute of Limitations, as against a debt due to the complainant, and recoverable under a creditors' bill. *Sabel vs. Slingluff, &c.*, 132.
2. As a general rule the Statute of Limitations is a bar to a bill in equity for an account, just as it is a bar to an action of account in a Court of law. *Weaver vs. Leiman*, 708.
3. Where there is an express, subsisting and recognized trust, and the *cestui que trust* demands in equity an account from the trustee, neither the period of limitation prescribed by Statute, nor length of time is a bar to relief. *Id.*
3. But where there is merely an implied or constructive trust arising by operation of law, Courts of equity, as a general rule, will follow and obey the law by applying the statutory limitation of time. *Id.*
5. Where there is a trustee competent to sue and protect the trust estate, limitations run in favor of a *stranger* to the trust, notwithstanding the *cestui que trust* may be an infant. *Id.*
6. A party intruding upon an infant's estate becomes constructively his guardian or trustee, but against such a trust limi-

**LIMITATIONS, STATUTE OF.—Continued.**

tations run; and to avoid the bar, the bill for account must be filed within three years after the infant arrives at age. *Ib.*

7. Mere doubt as to the right, or difficulty in the way of its assertion will not affect the running of the Statute; apart from the disabilities expressed in the Statute itself, there must, in order to prevent its operation, be some insuperable barrier, or some certain and well defined exception clearly established by judicial authority. *Ib.*

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 2.

HUSBAND AND WIFE, 2.

**MALICIOUS PROSECUTION.**

1. In order to maintain the action for malicious prosecution, it is incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously and without probable cause. *Johns vs. Marsh*, 323.
2. These ingredients are essential to the right of action, and if they are not found to co-exist, the action is not maintainable. *Ib.*
3. While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet, any motive other than that of instituting the prosecution for the purpose of bringing the party to justice, is a malicious motive on the part of the person who acts under the influence of it. *Ib.*
4. In an action for malicious prosecution, the defendant prayed the Court to instruct the jury, that their verdict must be for the defendant, unless they should find that he was actuated by malice, and also that he acted without reasonable or probable cause in instituting the criminal proceeding against the plaintiff. **HELD:**
  - 1st. That this prayer was too abstract in form to have enlightened the jury as to what constituted malice in the sense of that term as applied to said action.
  - 2nd. That the prayer was also defective in submitting to the finding and conclusions of the jury, the question as to what did or did not amount to probable cause.
  - 3rd. That while the jury are required to find whether the facts alleged in support of the presence or absence of probable cause, and the inferences to be derived therefrom, really exist, it is for the Court to determine whether upon the facts so found, there be probable cause, or the want of it. *Ib.*

**MALICIOUS PROSECUTION.**—*Continued.*

5. Probable cause is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion. *Id.*
6. Mere belief that cause existed, however sincere that belief may have been, is not sufficient. *Id.*
7. Case where probable cause was held not to exist. *Id.*

**MANDAMUS.**

*See* LIGHT STREET BRIDGE.

**MISAPPROPRIATION.**

*See* BOUNTY, 2.

**MISTAKE.**

*See* TRUSTS, TRUSTEES, &c., 8.

**MORTGAGE, MORTGAGOR, MORTGAGEE.**

1. A bill was filed by the senior mortgagee for a sale of the mortgage property, to pay his claim, and all the junior lienholders, together with the mortgagor, and the grantee of the land subject to the mortgages thereon, were made parties defendants, and all, except the mortgagor and his grantee came in and answered, admitting the allegations of the bill and submitting to a decree, and against the mortgagor and his grantee an interlocutory decree was had; a trustee was appointed to make sale of the mortgaged premises, and authorized to sell so much thereof as might be necessary for the purposes, and on payment of the entire purchase money, to convey the property sold, clear and discharged of all claim of the parties to the suit. The trustee sold the entire mortgaged property *in solido*, save two acres, which was sold separately. The proceeds of sale were more than sufficient to pay the claim of the complainant. It did not appear that a more advantageous sale would have been effected by selling the land in parcels. On exceptions by the grantee of the mortgagor to the ratification of the sale on the grounds that the decree did not authorize a sale of more land than was enough to pay the complainant's claim and costs, and that the land was divisible into parts and the trustee should have divided and sold it in parcels, the exceptions were overruled and the sale was sustained. *Johnson vs. Hambleton, &c.*, 378.

MORTGAGE, MORTGAGOR, MORTGAGEE.—*Continued.*

2. Where on a bill filed by the senior mortgagee for a sale of the mortgaged premises, to obtain payment of his claim, the junior lien-holders who were made parties defendants, came in and answered, admitting the allegations of the bill, which alleged their claims to be unpaid, and consenting to a decree, such admission and consent must be regarded as a submission of their rights to the protection of the Court, though they did not formally pray payment of their mortgages. *Ib.*
  3. Where a bill is filed by the senior mortgagee for the sale of the mortgaged premises, to secure the payment of his claim, it is proper to make the junior lien-holders parties to the suit, with a view to a final settlement of the rights of all the parties in interest. And when they are thus made parties, they are concluded by the decree. *Ib.*
  4. Where a decree is passed for the sale of mortgaged property on a bill filed by the senior mortgagee to secure the payment of his claim, the junior lien-holders having been made defendants, and having answered, admitting the allegations of the bill, and consenting to a decree, such decree, as being the better practice, should refer specially to the junior lien-holders, defendants, and provide in so many words for the payment of their claims out of the surplus proceeds of sale. But the omission to do so should not be held to prejudice their rights. *Ib.*
  5. The equities of such junior lien-holders are as much before the Court and as much entitled to its protection as the complainant who is the holder of the first mortgage; and the Court will not lose sight of their interest when they are in Court assenting to the sale and relying on the Court for protection. *Ib.*
- This case distinguished from the cases of *Boteler & Belt vs. Brookes*, 7 *Gill & John.*, 143, and *Hubbard and Wife vs. Jarrell, et al.*, 28 *Md.*, 66.
6. The affidavit required by sec. 29 of Art. 24 of the Code, to be made by a mortgagee as to the truth and *bona fides* of the consideration expressed in the mortgage, must be endorsed thereon, and recorded with it; such endorsement is essential to the validity of the mortgage. *Reiff, et al. vs. Eshleman*, 582.
  7. The fact that the oath was taken by the mortgagee, can only be established by a formal endorsement upon the mortgage; it is not the subject of parol proof. *Ib.*
  8. A paper attached to a mortgage of real estate situate in Maryland, purporting to be a certificate that an affidavit was

MORTGAGE, MORTGAGOR, MORTGAGEE.—*Continued.*

made in the State of Pennsylvania by the mortgagee as to the truth and *bona fides* of the consideration in the mortgage, before a person styling himself a Justice of the Peace of the former State, and signing himself, "A. B. Reidenbach, J. P.," but without further attestation, can have no weight, and the mortgage must be considered as one without an affidavit endorsed thereon as required by sec. 29 of Art. 24 of the Code. *Ib.*

9. The recording of a mortgage without the affidavit of the mortgagee endorsed thereon, as required by sec. 29 of Art. 24 of the Code, does not operate as constructive notice to a subsequent mortgagee but actual notice of such defective mortgage establishes its priority *Ib.*
10. Israel Reiff and John Horst were mortgage creditors of Abraham Horst, and Mary W. Miller was a judgment creditor. Anna Horst united with her husband Abraham Horst in a mortgage dated the 17th of December, 1875, to Israel Reiff, John Horst and Daniel Cearfoss, and in mortgages to other parties. Abraham Horst becoming involved, executed on the 10th of July, 1876, a deed of trust, in which his wife joined, of all his property of every description to the said Israel Reiff, John Horst and Daniel Cearfoss, stipulating for its sale, and for the payment, first, of all liens and incumbrances according to their priority, and secondly, of all the other debts of the said Abraham Horst, without any preference or priority among them. The deed also provided for the payment to Anna Horst, wife of Abraham Horst, in consideration of her uniting in said deed, of the one-twelfth of the gross proceeds of the sale of the real estate thereby conveyed in trust, in lieu of her contingent right of dower therein. The grantees in this deed accepted the trust, and proceeded to sell all the property as therein provided. In the distribution of the proceeds of the real estate, it was HELD:
  - 1st. That the grantees in the deed were bound by the stipulation and agreement contained therein, in favor of the wife, and the mortgage to them should be subjected to the allowance to her of the one-twelfth as provided by said deed.
  - 2nd. That the claim of Mary W. Miller, she not having been a party to the deed of trust, should not be subjected to the charge upon the proceeds of the real estate, in favor of Mrs. Horst. *Ib.*

See OWELTY OF PARTITION, 2, 3, 4.

MORTGAGE, MORTGAGOR, MORTGAGEE.—*Continued.**See SALE.*

WILLS, CONSTRUCTION OF, 3.

## MULTIFARIOUSNESS.

*See EQUITY PLEADING.*

## NATIONAL BANK.

1. The demand and receipt by a National Bank of usurious interest from endorsers upon notes discounted by it, the payment of which notes was guaranteed to the bank by L. in a written guaranty, does not avoid the contract of guaranty between L. and the Bank. *Lazear vs. National Bank of Md.*, 78.
2. A National Bank has no authority under the Banking Act to use its funds in purchasing notes, and can acquire no title thereto by the purchase. *Id.*
3. Where a guaranty is given to a National Bank for all liabilities to said bank of certain parties, then existing or which might thereafter arise, to the extent of an amount specified, the guarantor holding himself liable to that extent for all paper that might be held by the Bank of said parties, either as drawers or endorsers, and the Bank subsequently discounts paper, of which said parties were drawers or endorsers, it is exclusively within the province of the jury in an action by the Bank against the guarantor, to determine whether the money was parted with by the Bank on the faith of the guaranty or otherwise. *Id.*

## NAVAL ACADEMY.

*See ACTS OF ASSEMBLY, CONSTRUCTION OF, 2.*

## NON COMPOS MENTIS.

*See DEED, 3.*

## NOTICE.

*See LANDLORD AND TENANT.*

## NUISANCE.

*See DAMAGES, 1, 3.*

## ORDER AND ACCEPTANCE.

The eighth count of the *narr.* in this suit brought by the appellee against the appellants declared upon the following order and acceptance:

“GRANITE, Aug. 28th, 1877.

“MESSRS. GILL & McMAHON.

*Gent.*—Please pay Wm. F. Weller, or order, two hundred dollars on Sep't 10, and your note for bal. due on forty thousand



ORDER AND ACCEPTANCE.—*Continued.*

Belgian paving blocks, at forty-eight dollars pr. thousand, James Clegg agreeing to deliver you, forty or more thousand blocks, on the line of your road on cars, or the place called the Summit."

"JAMES CLEGG."

"We accept this order when the blocks ~~is~~ delivered."

"GILL & McMAHON."

It was in evidence that thirty-eight thousand three hundred blocks were delivered by Clegg, and received by the defendants before the 10th of September. On the 11th the plaintiff took possession under a bill of sale, of the granite blocks quarried by Clegg; and on the next day called on the defendants, to ascertain the number of blocks that had been delivered, and proposed to deliver the balance, when he was informed by them that they did not then want them, that they had no use for them. The plaintiff directed his men to deliver at the "Summit" the remaining seventeen hundred blocks, which was done four or five days thereafter. The defendants refused to receive them; but the blocks were nevertheless "dumped" out upon the ground, there being no cars there at the time in which to put them. **HELD:**

1st. That the acceptance of the order was conditional, and binding on the defendants only in the event that the whole number of forty thousand blocks should be delivered by the 10th day of September.

2nd. That as there was no privity of contract between the defendants and the plaintiff, and as the whole right and claim of the latter was based upon the order and acceptance, no right of action could arise, the condition not having been performed by the delivery of the blocks before the 10th day of September. *Gill & McMahon vs. Weller*, 8.

## ORPHANS' COURT.

1. Sec. 250, of Art. 93, of the Code, requires the Orphans' Court in all cases of controversy therein, if either party require it, to direct an issue or issues to be made up and sent to any Court of law convenient for trying the same. **HELD:**

1st. That the obvious purpose of this provision is to enable the Orphans' Court to advertise itself of the real facts of the case. These when found by the jury are conclusive upon the Orphans' Court, which has no

ORPHANS' COURT.—*Continued.*

discretion, but must enter the judgment in conformity with the finding of the jury.

2nd. That in framing issues, it is the duty of the Orphans' Court to present the questions of fact in dispute and to be determined by the jury, in a plain and clear way. There is an obvious impropriety in multiplying the issues unnecessarily, and especially in presenting the same substantial question in two separate and distinct issues. *Sumwalt vs. Sumwalt, et al.*, 388.

2. On a caveat to a will, the first issue granted by the Orphans' Court presented the question whether the execution of a paper purporting to be the will of S., was "procured by undue influence practised upon him." **HELD :**

That it was error to grant a second issue presenting the question whether the execution of said paper was obtained from the said S., "by the exercise of a dominion or influence by some person or persons which prevented the exercise of a sound discretion on the part of the said S." *Id.*

3. It is not the province of the Orphans' Court to define the nature or degree of influence which will render a will void. *Id.*

4. The third issue granted presented the question whether said paper-writing was "revoked after the making and execution thereof." **HELD :**

1st. That the questions raised by two other issues, as to the effect of certain deeds mentioned therein, and whether they operated to revoke said will, were questions which arose under, and were properly presented by, the third issue; and said issues were improper to be granted.

2nd. That what would be the effect produced by a fraudulent concealment of said will to prevent its being cancelled or destroyed, was a question which could properly be raised under the third issue, and ought not to be made the subject of a further and distinct issue. *Id.*

5. A paper-writing purporting to be the last will of N. W., was exhibited in the Orphans' Court by J. L. R., one of the executors, and proved in the usual form by the three subscribing witnesses. Afterwards J. F. C. W., also named as one of the executors, filed a petition and caveat alleging that said paper contained in fact the true last will of N. W. but that after its execution it was fraudulently altered, without the authority or knowledge of the testator, by the insertion therein of certain words of gift to said J. L. R., the effect of

ORPHANS' COURT.—*Continued.*

which was to make the instrument appear to bestow upon said J. L. R. one-half of the whole residuary estate. D. W. W. and O. A. W. two of the heirs-at-law also filed their petition, and caveat to the entire paper exhibited, alleging that it was not executed in the manner and form required by law; that at the time it was executed, N. W. was not of sound and disposing mind; that it was the result of undue influence and undue importunities, and that it was obtained and procured by misrepresentations and by fraud and deceit. An answer to the petition and caveat of J. F. C. W. was filed by J. L. R. denying the allegation of a fraudulent alteration or interlineation of the paper in question. Separate answers were filed to the caveat of the heirs-at-law, by J. L. R., J. F. C. and J. F. C. W., the three executors named in the alleged will. J. L. R. insisted upon the validity of the entire will; J. F. C. alleged that he knew nothing of the will except what is disclosed upon its face; and J. F. C. W. insisted upon its validity except as far as it was fraudulently altered as alleged in his caveat. Issues were thereupon prayed as follows: J. F. C. W., asked for four issues raising in different forms, questions as to the alteration of said paper, and its due execution and validity except as to said alteration. J. L. R. asked for one issue presenting the question as to the fraudulent alteration of said paper; and the contesting heirs-at-law asked for six issues presenting questions as to the valid execution of the paper, the sanity of the testator and the exercise upon him of undue influence, fraud, deceit and misrepresentation. All the issues asked for were allowed by the Orphans' Court, and they were grouped together in one case with J. F. C. W., and D. W. W., and O. A. W., as caveators, and J. L. R., and J. F. C. W., J. L. R. and J. F. C., executors as caveatees. On appeal it was HELD:

- 1st. That the Orphans' Court acted rightly in bringing together the several issues asked for, in the *one* case, and in designating the caveators and caveatees as they had done in its titling.
- 2nd. That although possibly it would have been more systematic, and have tended to simplify the proceedings to have arranged the issues differently from what was done, such arrangement was but matter of form and did not constitute error.
- 3rd. That it would be for the Court where the issues were tried, to allow J. F. C. W. to explain his position in the

ORPHANS' COURT.—*Continued.*

case as both caveator and caveatee, and with proper instructions granted to the jury, there could be no confusion in their finding upon the several issues.

4th. That as to the order of argument, the caveator, J. F. C. W., would be allowed to open upon his issues involving the alteration of the will, and the caveators D. W. W. and O. A. W., would also open upon their issues; J. L. R., the respondent to the caveat of J. F. C. W., would reply, and also the counsel for the will; J. F. C. W. was then entitled to close on his issues, and D. W. W. and O. A. W. upon theirs. Thus upon both caveats there would be an opening, a reply and a closing; and while the danger of conflicting verdicts was avoided, neither of the parties interested was deprived of any right.

5th. That the order in which the evidence was to be offered would also be readily determined by the Court before which the issues were tried. *Worthington vs Ridgely, &c.*, 349.

6. A testator died in the year 1850. His executor qualified as such, and returned an inventory of the estate; afterwards he returned a list of sales, passed an account, and in April, 1853, made distribution of the balance which that account showed to be in his hands. The executor died in the year 1854. In the inventory which had been returned by him was included a parcel of leasehold property, which was not included in the list of sales or in the distribution made by him. In the year 1878, a petition was filed in the Orphans' Court by some of the parties interested in the estate, asking that an administration *de bonis non*, be granted for the purpose of making distribution of said leasehold property. This petition was resisted by the widow of the testator, on the ground that the executor had sold the said property to her and she had paid him for it, and that the claim was barred by lapse of time. On appeal from an order of the Orphans' Court dismissing said petition, it was HELD:

- 1st. That said order regarded as an adjudication by the Orphans' Court, that no administration was necessary or should be granted, was erroneous.
- 2nd. That even if the property had been sold to the widow and paid for by her, this would form no ground for refusing the letters, which were necessary for the purpose of perfecting her title. And if her allegation in regard to the sale were true, it would show an amount for dis-

ORPHANS' COURT.—*Continued.*

tribution in the late executor's hands, which could be reached in this way more appropriately than in any other.

3rd. That the lapse of time interposed no bar to the granting of such letters.

4th. That it was not the province of this Court as the case stood, to decide who was entitled to the letters, but that question first belonged to the Orphans' Court. *Neal, et al. vs. Charlton*, 495.

## OWELTY OF PARTITION.

1. On the 10th of February, 1877, W. D., conveyed certain land to trustees for the benefit of his creditors. The trustees made sale of the same, and an account was stated by the auditor distributing the proceeds amongst certain preferred creditors. The land thus sold had been conveyed to W. D. by his brothers and sisters, by a deed dated March 20th, 1854, in which after reciting a partition made by mutual consent between the grantors and W. D. of the real estate devised to them by their father, it was further recited that the land conveyed by said deed had in said partition been allotted to W. D., one of said devisees as his portion of said real estate, but "*charged with the payment*" of certain specified sums to the trustees of his three sisters respectively, for owelty of partition. As a further security for the payment of these several sums, W. D. executed his three several bonds, in favor of the trustees of his said sisters, and on the 12th of July, 1854, conveyed to the same trustees, the same land to secure the payment of the same several sums of money and interest thereon. The interest was paid by W. D. down to July 1st, 1869, but the whole principal and interest from that date remained unpaid, and constituted certain claims allowed in the auditor's account as preferred claims. On exception to these claims, it was HELD:

1st. That by the deed of March 20th, 1854, the several sums of money payable to the trustees of the sisters of W. D. were expressly charged upon the land.

2nd. That the said charge was not in the nature of a vendor's lien resting only upon the interest or share conveyed by the grantors respectively, but by the terms of the deed it was charged upon the whole estate therein described and which was held by W. D. subject to the charge thereby created.

3rd. That the bonds and deed of trust of July 12th, 1854, even if the latter was in all respects valid in law, were

OWELTY OF PARTITION.—*Continued.*

mere collateral securities for the same debts, and would not have the effect of impairing the charge created by the deed.

- 4th. That said claims were properly allowed as preferred liens on the fund. *Stanhope & Co. vs. Dodge, et al.*, 483.
2. Certain other claims allowed as preferred claims were upon promissory notes of W. D., dated January 24th, 1868, secured by deed of trust made February 14th, 1868, by W. D. and wife, and recorded August 25th, 1869. There was no evidence that it was withheld from record with any fraudulent intent. On exception to said claims it was HELD:
  - 1st. That the provisions of the Code relating to the execution and recording of mortgages, are to be construed as referring to deeds of mortgage technically such, and do not apply to deeds of trust such as the deed of February 14th, 1868.
  - 2nd. That under Art. 24, sec. 19, of the Code, said deed not being a mortgage might be recorded at any time.
  - 3rd. That the saving clause in said sec. 19 in favor of creditors, is not to be construed as applicable only to creditors who may have acquired liens upon the land, but embraces all creditors who come within the terms of the saving clause.
  - 4th. That so far as respects the debts, if any, of W. D. created before the 14th day of February, 1868, the date of the deed, or thereafter created with notice of the deed, these must be postponed to the claims thereby secured, and in the same manner the parties whose claims were secured by the deed were entitled to priority over all creditors who became such after the 25th day of August, 1869, when the deed was recorded.
  - 5th. But as respects the creditors, if any, whose debts were contracted after the date of the deed and before it was recorded, without notice thereof, these if they were merely general creditors who had not acquired liens on the land, were entitled to come in *pari passu* with the parties whose claims were secured by the deed, and to participate with them ratably in the distribution, and if they had acquired liens on the land they were entitled to priority over those in whose favor the deed was made. *Id.*
3. Certain other claims which were allowed a preference by the auditor, were based upon promissory notes of W. D., dated January 1st, 1868, in favor of the trustees for his sisters,

OWELTY OF PARTITION.—*Continued.*

secured by a deed made by W. D. and wife, on the 16th of February, 1868. The deed was a conveyance to the creditors directly for the purpose of securing the debts due and payable to them, and provided for a release and re-conveyance of the property on payment of the debts secured.

**HELD :**

- That the deed was strictly and technically a mortgage within the meaning of the Code, subject to the provisions therein contained relating to the execution and acknowledgment and recording of such instrumenta. *Id.*
4. The deed was executed and acknowledged before H. R., a Commissioner of Deeds for the State of Maryland, in the District of Columbia, and was recorded on the 26th of August, 1869. An affidavit was made by the grantees "that the several debts mentioned and secured by them in and by the foregoing and annexed deed are justly and *bona fide* owing to them as set forth in said deed." This affidavit was made at the same time that the acknowledgment was made, and before H. R. who had taken the acknowledgment, as Commissioner of Deeds, but the certificate was signed by him, not as Commissioner of Deeds, but with the letters "J. P" affixed to his name. **HELD :**
- 1st. That the affidavit although not in the words prescribed by sec. 29, Art. 24, of the Code, was of equivalent import and effect, and so far as the form of the affidavit was concerned, it was a substantial compliance with the requirement of the Code.
  - 2nd. That H. R.'s affixing the letters "J. P." to his name, or calling himself a justice of the peace, did not impair the validity of the affidavit, as it appeared on the face of the paper that he was at the same time a Commissioner for the State of Maryland, and therefore a person before whom the affidavit could lawfully be made.
  - 3rd. That said deed being a mortgage, did not come within the provisions of Art. 24, sec. 19, of the Code, and was not entitled to be placed upon record after the expiration of six months from its date without an order or decree of a Court of Chancery for that purpose as prescribed by Art. 16, sec. 23.
  - 4th. That the registration of the paper without such order could not have the effect of constructive notice to subsequent purchasers or creditors, and the paper must be considered as a mortgage unrecorded.
  - 5th. That being in all respects regularly executed and acknowledged with a sufficient affidavit by the mortga-

OWELTY OF PARTITION.—*Continued.*

gees, it was valid between the parties, and if made *bona fide* and not withheld from the record for a fraudulent purpose, or in other words, if it was an instrument which a Court of Chancery would order to be recorded under sec. 23, it operated to give to the persons whose debts were thereby secured, priority over all creditors of W. D., whose debts were contracted before its date, and also over all subsequent creditors who became such with actual notice of the deed. *Ib*

## OYSTERS.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 1.

## PARTNERS AND PARTNERSHIPS.

1. If a partnership under Articles, for a definite time, is silently continued after that time, the Articles will continue in force as between the partners, except so far as the firm in the after conduct of its business, varies or departs from them, or appears to adopt new ones. *Sangston, et al. vs. Hack, et al.*, 173.
2. Three brothers, who had entered into a partnership under Articles, for a definite time, agreed in writing, endorsed on the Articles, to continue the partnership for two years, "subject to a charge of twelve *per cent.* of the net profits" to a former clerk, "in lieu of the salary heretofore allowed him."

## HELD:

- 1st. That this did not make the clerk a partner, for where a percentage of profits is adopted simply as a mode of measuring the amount of wages, salary or remuneration, the fact that it is made contingent upon profits does not create a partnership.
- 2nd. That assuming, that he was a partner, and so continued for the two years, his withdrawal at the end of that time did not prevent the continued operation of the Articles as between the three brothers, who afterwards continued the business of the firm. *Ib*.
3. One of the brothers died in April, 1851, leaving a will, and in August of that year, the two survivors formed a new partnership under the same name, and continued the business for three years when they failed. More than eighteen years after the testator's death, a bill was filed by his children and grand-children, beneficiaries under his will, against the surviving partners for an account. **HELD:**

That under the peculiar circumstances of the case (which are pointed out in the opinion of this Court) the Court below was right in directing the account to be stated from the Cash book and Ledger of the old firm, the



PARTNERS AND PARTNERSHIPS.—*Continued.*

- only ones still extant, the others after being preserved for a long time, having been sold for waste paper. *Id.*
4. No compensation can be allowed surviving partners for winding up the partnership, unless so *stipulated* in the partnership Articles; but when such stipulation is made, it must be carried out, and compensation allowed. *Id.*
  5. Where each partner agrees to contribute a certain sum of money as capital, and the enterprise proves a failure, the partner who has brought in nothing, must make good to his co-partners the proportionate share he agreed to furnish. *Id.*
  6. Upon a bill for an account by the representatives of a deceased partner against the surviving partners, the latter are not competent witnesses in their own behalf. *Id.*

*See* EVIDENCE, 2.

## PERSONAL PROPERTY.

*See* SECURITY.

## PLEAS AND PLEADING.

*See* ACTS OF ASSEMBLY, CONSTRUCTION OF, 2.  
CORPORATIONS, 4.  
COVENANT.  
DRAFT, 1, 2.  
PRACTICE, 2, 3, 4, 5, 7.

## POWER.

*See* WILLS, CONSTRUCTION OF, 7.

## PRACTICE.

1. If a party intend to have the decision of the Court below on a plea of *nul tiel record*, reviewed in the Court of Appeals, he must tender a bill of exceptions setting forth the record offered in evidence under the plea, the ruling of the Court with respect to it, and the exception thereto. *First National Bank of Hagerstown, Garn. vs. Weckler*, 80.
2. The first count of a declaration charged that W. and M. the defendants, had unlawfully, wickedly and maliciously seized and taken possession of the plaintiff's boat whereby he was greatly damaged and injured. To this count the defendants pleaded the general issue, and filed separate pleas by way of justification to the whole declaration. The separate plea of the defendant W. alleged that the boat mentioned in the declaration was being used for the purpose of dredging oysters in the waters of Wicomico county, and that on being pursued the person in charge of said boat escaped, and the boat itself was taken by the defendant as deputy commander of the State Fishery Force, and delivered to the

PRACTICE.—*Continued.*

defendant M. a Justice of the Peace of said county to be disposed of according to law. The separate plea of the defendant M. alleged that the boat was delivered to him as a Justice of the Peace of Wicomico county by the defendant W. acting as deputy commander of the State Fishery Force, charged with violating the provisions of the Act of 1872, ch. 241; and that as Justice of the Peace he held the same upon said charge, to await the adjudication of the questions of law arising in connection with the condemnation of said boat. To these pleas the plaintiff demurred. **Held:**

- 1st. That under the facts set forth in these pleas, the defendants were not justified in taking the plaintiff's boat, the Act of 1872, ch. 241, under which the seizure was made, having been repealed by the Act of 1874, ch. 181, and the demurrer should be sustained.
- 2nd. That the plea of the defendant M. being a plea in bar, was bad, not being an answer to the whole declaration.
- 3rd. That the plea to have been good and sufficient, ought to have concluded by denying that the defendant "unlawfully, wickedly and maliciously" took the plaintiff's boat. *Willing and Mæick vs. Boeman*, 44.
8. If a plea undertake to answer the whole declaration, but in fact answers a part only, the plea is bad, and the plaintiff may demur. *Id.*
4. A count charging one of two persons with trespass, without designating which of the defendants committed the trespass, is, as a count charging a separate trespass, bad. *Id.*
5. Where a general demurrer to pleas is sustained, the defendants are not entitled to judgment because one of the counts of the declaration is defective, the other counts being good, and sufficient to support the action. *Id.*
6. A judgment recovered against a defendant in another State, is a bar to a suit brought upon the same cause of action in this State; and when it is relied on as a plea in bar, the only question open for inquiry is whether the Court in which the judgment was rendered had jurisdiction of the person or subject-matter. The judgment is conclusive as to the merits of the controversy. *Harryman and Schryver vs. Roberts*, 64.
7. Where a suit is brought in this State on the same cause of action on which judgment has been recovered in another State, and such judgment is pleaded in bar to a recovery in the second suit, it is no sufficient answer to such plea, to

PRACTICE.—*Continued.*

allege that a motion was filed by the defendant in the Court in which the judgment was rendered to set the same aside on the ground that he was not indebted to the plaintiffs, and that he had not been served with process; and that for the purpose of pleading the said judgment in bar in the second suit, the defendant fraudulently consented to have the said motion overruled. *Ib.*

8. While it is essential to the validity of a judgment that the defendant should have notice of some kind, it is not always necessary that he should be served with personal process. *Ib.*
9. Each State has the right to prescribe by law how its citizens shall be brought into its Courts; and if process be served upon a defendant according to the laws of the State of which he is a resident, and judgment be afterward rendered against him, such judgment is as binding between the parties in this State when relied on as a bar to the prosecution of a second suit upon the same cause of action, as it is in the State where it was rendered. *Ib.*
10. In order to make a judgment in a prior suit between the same parties a bar to a second suit, it is only necessary to prove that the subject-matter of the two suits is substantially the same. The fact that the forms of action in the two cases are different, does not affect the question, provided the matter in controversy be the same. *Ib.*
11. Under the eighth Rule of the Court of Appeals, the case was sent back to the Superior Court of Baltimore City, was placed upon the trial docket of that Court, was on the 10th day of September, marked for trial at the regular call of the docket, and was reached on the 30th day of November following, and was then called for trial. The Court below then required the trial to be proceeded with. On appeal by the defendant it was HELD:  
That this was ample notice to the defendant, and the Court below was right in requiring the trial to be proceeded with. *Weber vs. Fickey*, 500.
12. A demand for a bill of particulars was made in the Superior Court after the trial had begun, and after a former demand had been complied with, which compliance the Superior Court decided, was a satisfaction of the demand. By the fourteenth rule of that Court, it is provided that "if the declaration shall not disclose the particulars of the plaintiff's demand, the defendant at any time before the cause shall have been entered on the trial docket, or afterwards

PRACTICE.—*Continued.*

with leave of Court, may enter on the docket a demand of particulars of the claim or demand," &c. **HELD:**

That even if no former demand had been made and satisfied, the demand came too late under the rule of Court.  
1*b*.

*See* ATTACHMENT, 5.

CORPORATIONS, 4.

ORPHANS' COURT, 5.

PRACTICE IN THE COURT OF APPEALS, 4.

## PRACTICE IN EQUITY.

1. An application for an injunction was heard upon bill, answer and replication. A material allegation in the bill was denied in the answer in terms clearly and unequivocally responsive to the bill. Other facts were mentioned in support of this denial bordering on the verge of new matter. Certain exhibits relied on in the bill were in the answer admitted to have been executed by the firm of which the respondent was the survivor, but on terms and conditions materially different from those alleged in the bill; and the exhibits themselves did not fully sustain the construction placed upon them in the bill. The allegations of the complainant describing an interview between his attorney and the respondent, and certain verbal promises of the respondent to the attorney, were positively denied. On appeal from an order refusing the injunction, it was **HELD:**
  - 1*st*. That as the answer so far as responsive to the bill was to be taken as true, on the application for the injunction, the replication had no effect and performed no office at that stage of the cause; its real and only effect being to determine the nature and extent of the issue between the parties, and to regulate the *onus* of proof with a view to the final hearing.
  - 2*nd*. That looking to the bill, and the answer as far as responsive to the bill, the order refusing the injunction was properly passed. *Dougherty vs. Piet*, 425.
2. The allegations of a bill, and the relief sought had reference to, and were based upon what was charged to be the illegality of the acceptance of a certain proposal by the Board of Commissioners of Public Schools in the City of Baltimore, or a certain committee of that Board, made to them by C. one of the defendants; the illegality in the contract entered into between C. and the Board of Commissioners of Public Schools; and the bond taken by the latter from the former

PRACTICE IN EQUITY.—*Continued.*

for the due performance of the contract; the object of the bill being to have the execution of the contract restrained, and the whole transaction declared void as being in violation of the ordinances of the city. All the documents charged to be void were of a public nature, and accessible to the complainants as to any other person interested in them, and yet copies of them had not been exhibited with the bill, nor was there any reason assigned for the omission to exhibit them. **HELD:**

That for the Court to declare all said documents illegal, or to act upon the assumption of their invalidity, upon the mere allegation of the bill, without an opportunity of inspecting them, would be a most dangerous proceeding, and as such ought not to be sanctioned. *Mayor, &c. of Baltimore vs Weatherby, et al.*, 442.

3. A commission had been returned at the instance of the complainant, and after he had full opportunity to take his testimony. More than eight months thereafter, and after the case was ready for hearing he applied to have the commission remanded to enable him to take further testimony. **HELD:**

That there was no error in refusing this application; there is no rule of equity practice that will justify the remanding of the commission under such circumstances. *Davis vs. Hall*, 673.

*See* MORTGAGE, &c.; 2, 3, 4, 5.

SALE.

## PRACTICE IN THE COURT OF APPEALS.

1. An objection as to the time of the production of evidence will not be reviewed on appeal. *Orenshaw vs. Slye*, 140.
2. Where accounts are stated by the auditor to represent the views and claims of the respective parties under their instructions, such accounts may be reviewed on appeal, though no exception thereto was taken in the Court below by either party. *Waller and Wife vs. Foutz*, 147.
3. After the filing of the bill, the time within which, by the terms of the Act of 1865, ch. 32, the defendant was required to complete its road, expired. No supplemental bill was filed suggesting that as an additional reason for the injunction, and subsequent to its expiration the commission to take testimony was issued and executed, and the bill was dismissed by consent *pro forma* for the purpose of an appeal. **HELD:**

1st. That under such circumstances, this Court on review must consider all the proceedings as relating to the time

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

of filing the bill, and decide the cause according to the actual rights of the defendants at the time they were, at the instance of the complainants, arrested by injunction from proceeding with a work which was then legitimately authorized.

2nd. That the injunction granted originally on the complainants' prayer, ought not to have been granted when it was granted, therefore the final order dissolving it was correct.

3rd. That to hold otherwise on this point would in effect be declaring a forfeiture of the defendant's charter in an incidental way, without any proceedings instituted for that purpose. *Hiss and Wife, et al. vs. Baltimore and Hampden Pass. Railway Co., et al.*, 242.

4. The plaintiff in error was charged before a justice of the peace with a violation of the provisions of the Act of 1872, ch. 198, and the amendments thereto contained in the Act of 1878, ch. 502. The statute by express terms gave the right of appeal from the judgment of the justice to the Circuit Court, without giving any right of appeal to the Court of Appeals. The judgment of the justice being against the plaintiff in error, whereby he was fined and his boat and nets confiscated, he took an appeal to the Circuit Court, and gave bond to prosecute that appeal with effect or to abide a judgment of affirmance. On a writ of error it was HELD:

1st. That having invoked that jurisdiction, and submitted himself to it, and the case having been regularly tried, he had no redress by an appeal or writ of error to this Court.

2nd. That although the Circuit Court in hearing and adjudicating upon the appeal, was not in the exercise of its ordinary common law jurisdiction, but was acting as a Court of special jurisdiction, bound to observe and conform to the provisions of the statute, its judgment rendered within the limits of the special jurisdiction conferred, was not only binding but final, and this Court has no power to review it.

3rd. That if, instead of the appeal under the statute the party had applied for the writ of *certiorari* upon the specified ground of the unconstitutionality of the statute, and the consequent want of power and jurisdiction of the magistrate to proceed under it, the Circuit Court would then have been in the exercise of its ordinary

PRACTICE IN THE COURT OF APPEALS.—*Continued.*

common law jurisdiction, and from its judgment in the premises a writ of error or an appeal could have been prosecuted to this Court.

4th. That the fact that the statute gives an appeal to the Circuit Court from the judgment of the magistrate, does not take away or deprive the party of the benefit of a *certiorari* for the purpose of having decided the question of the power and jurisdiction of the magistrate, though the writ will not be granted to bring up the case on its merits as distinguished from the question of jurisdiction where an appeal is given. *Rayner vs. State*, 368.

5. Art. 5, sec. 29, of the Code, precludes this Court from entertaining the question as to the sufficiency of the averments of the bill to give the Court jurisdiction, where the record does not show that the question was raised in the Court below. *Estep and Shaw vs. Mackey, et al.*, 592.
6. The awarding of costs in a litigation in the Orphans' Court, is, under sec. 250 of Art. 93 of the Code, altogether in the discretion of the Court, and is not reviewable on appeal. *Bantz, Ex'r vs. Bantz, et al.*, 686.

See ORPHANS' COURT, 6.

PRACTICE, 1.

## PRAYERS AND INSTRUCTIONS.

Prayers merely calling attention to and emphasizing certain items of evidence as tending to prove certain facts are liable to abuse and calculated to mislead the jury. *Johns vs. Marsh*, 323.

See ACTION ON AN INJUNCTION BOND, 4.

CORPORATIONS, 4.

MALICIOUS PROSECUTION, 4.

WARRANTY.

## PRINCIPAL AND AGENT.

- A. having become a member of a Building Association, applied for the loan of a sum of money. It was agreed to loan the money upon the security of a mortgage on certain real property in Baltimore County, if the counsellor of the Association should report favorably upon the title. The mortgage was accordingly executed and taken by the counsellor of the Association, with the assent of A. to Towson town, where he went for the purpose of ascertaining the title of A., by an examination of the records. He found the title unsatisfactory, and so reported to the Association. The mortgage,

**PRINCIPAL AND AGENT.**—*Continued.*

however, was left in the clerk's office, and there placed upon record. The cloud upon the title was never removed to the satisfaction of the counsellor of the Association, though time was given to A. for the purpose, and the money agreed to be loaned, was never paid to A. The mortgage was put upon record by the counsellor of the Association, without its authority or knowledge. It had no knowledge by its proper officers of the recording of the mortgage, until about the time of the bringing of the suit by A. The action of its counsellor was not ratified or confirmed by the Association. In an action against the Association by A. to recover upon its promise to loan the sum agreed upon, it was **Held**:

That, as no actual notice of the recording of said mortgage was given to the defendant's board of directors, until at or about the time of the bringing of the suit by A., and as the defendant never ratified the act of its counsellor in leaving said mortgage for record, the plaintiff was not entitled to recover. *Conway vs. Log Cabin Perm. Build. Assoc'n of Baltimore*, 136.

**PROBABLE CAUSE.**

*See* MALICIOUS PROSECUTION.

**RATIFICATION.**

*See* ATTACHMENT, 6.

**REGISTRY LAW.**

*See* TRUSTS, TRUSTEES, &C., 8.

**REMAINDER.**

*See* WILLS, CONSTRUCTION OF, 1.

**REMOVAL OF CASES.**

The provision in the Constitution relating to the removal of causes, as that provision has been altered by the amendment of 1874, ch. 364, does not extend to the case of an appeal from a justice of the peace pending in a Circuit Court. *Geekie vs. Harboured*, 460.

**RES ADJUDICATA.**

*See* LANDLORD AND TENANT.

**RESULTING TRUST.**

*See* INSOLVENCY, 2.

TRUSTS, TRUSTEES, &C., 8.

**REVERSION.**

*See* WILLS, CONSTRUCTION OF, 7.



## RIGHT OF ACTION.

*See* ORDER AND ACCEPTANCE.

PRINCIPAL AND AGENT.

## RULE OF COURT.

*See* ATTACHMENT, 8.

## SALE.

In February, 1871, a mortgage was made of certain property consisting of about twenty-two acres, lying partly in Baltimore County, and partly within the City of Baltimore. Though described in the mortgage as three parcels of land, these were contiguous to each other, and constituted one parcel occupied as a dairy farm. About the year 1872, or 1873, the property was surveyed and laid off into lots and streets, but no improvements were made thereon, no streets were actually opened, nor was there any physical change in the condition of the property, or in its mode of occupation, the lots and streets being merely designated on a map, and marked on the ground by stones placed there for that purpose. The W. M. Railroad was constructed upon the property, crossing it diagonally, so as to completely separate it into two parts, about four acres being on one side of the railroad and the balance on the other side. Under proceedings of foreclosure of the mortgage the property was advertised and sold in one parcel, and was purchased by the mortgagee. The mortgage required "at least twenty days notice of the time, place, manner and terms of sale, in some newspaper published in the city of Baltimore." The advertisement was printed in a newspaper published in said city, the first insertion being on the 11th of March, and the last on the 18th of April. The day of sale was the 18th of April, but through mistake, the advertisement did not appear on the morning of the day of sale as is customary in the City of Baltimore. Accompanying each advertisement, were printed numbers and letters indicating the dates upon which the same would be published, and among these were the 17th and 18th of April, the day of sale and the day before, on both of which it was omitted. The effect of this omission as shown by evidence was to produce the impression upon the public that the sale would not take place. On exceptions to the sale filed by the mortgagor it was HELD:

- 1st. That the omission of the advertisement on the day of sale, was a valid and sufficient reason for setting aside the sale.

**SALE.—Continued.**

2nd. That the mortgagee on a re-sale was not bound to offer the property for sale in small lots fronting on the projected streets.

3rd. That the two parcels into which the land had been divided by the location of the railroad ought to be sold separately.

4th. That if one of those parcels should sell for enough to pay the mortgage and interest, with the taxes and costs, the other should not be offered.

5th. That the costs of the proceedings should be paid out of the proceeds of sale. *Patterson vs. Miller*, 388.

*See* MORTGAGE, &c., 1.

TRUSTS, TRUSTEES, &c., 3, 4, 5, 6, 7.

**SECURITY.**

On the 26th of August, 1865, B. sold to C. and P. a tract of land for \$54,607; of which \$29,607 was to be paid in cash, and the balance, \$25,000, was to be paid in five years, with interest on said sum, payable semi-annually. B. agreed to execute to any person purchasing a part of said land from C. and P. to the value of \$5000, a conveyance of such aliquot part of said land, upon the payment to him by C. and P. of such sum. B. further agreed to consummate the sale as soon as the proper papers could be prepared; and that his wife would unite therein for the purpose of releasing her dower. The cash portion of the purchase money was paid. On the 22nd of September, 1865, B. and wife leased to C. and P. the same tract of land for five years, upon the payment of the yearly sum of fifteen hundred dollars, as rent, in half-yearly instalments, with a covenant in the lease on the part of B. to convey to C. and P. the reversion at any time within five years upon the payment by them of \$25,000. Shortly after the execution of the lease B. went to Europe, and continued to reside there for several years after the expiration of the time within which C. and P. had the right to purchase the reversion. It was in proof, however, that B. was willing to accept the payment of \$25,000, both during and after the expiration of the term, and to convey the same to C. and P. in fee, but the latter insisted that the wife of B. should join in the conveyance; but this, owing to the relations then existing between him and his wife, B. refused to procure. P. assigned his interest in the land to C., his co-purchaser and co-lessee, who subsequently died, leaving a last will. The credit payment of \$25,000 with

**SECURITY.—Continued.**

interest, by consent of all the parties in interest, was paid by the executors of C. to the executor of B. On a bill filed by the executor of B. to have determined the respective rights of the parties in interest, it was HELD:

That the lease should be considered as a mere security for the payment of the \$25,000, part of the purchase money, and this sum, together with the interest thereon paid by the executors of C. to the executor of B., must be considered as personal estate, to be distributed as such.  
*Johns Hopkins University vs. Williams, &c.*, 229.

*See* ATTACHMENT, 8.

**SERVITUDE.**

*See* ESTOPPEL.

**SINGLE BILL.**

*See* FRAUDS, STATUTE OF, 2.

**SPECIAL JURISDICTION.**

*See* PRACTICE IN THE COURT OF APPEALS, 4.

**SPECIFIC PERFORMANCE.**

*See* CONTRACT, 8.

**STATUTES, BRITISH.**

29 Car. II, ch. 3, sec. 4, 628, 634.

19 and 20 Vict., ch. 97, sec. 3, 634.

**STOCKHOLDERS.**

*See* CORPORATIONS, 1.

**SUPPORT AND MAINTENANCE.**

*See* WILLS, CONSTRUCTION OF, 2.

**TAXATION, EXEMPTION FROM.**

*See* CORPORATIONS, 5, 6, 7.

**TAXES.**

*See* DEED, 5.

**TIMBER AND FIRE WOOD.**

*See* WILLS, CONSTRUCTION OF, 1.

**TRAVELLERS.**

*See* DAMAGES, 1.

**TRESPASS QUARE CLAUSUM FREGIT.**

*See* LANDLORD AND TENANT.

## TRUSTS, ACCEPTANCE OF.

1. Where the same parties are executors and trustees under a will, the fact that they take out letters of administration as executors, amounts to an acceptance of the trusts created and imposed upon them by the will. *Sangston, &c. vs. Hack, &c.*, 173.
2. Mere lapse of time and laches are not an absolute bar to an account, as between such trustees and the *cestuis que trust*, under the express trusts created by the will. *Id.*

## TRUSTS, TRUSTEES, CESTUIS QUE TRUST.

1. A. gave to his son-in-law B. the sum of \$400, and eleven years afterwards gave him an additional sum of \$2000, upon the verbal understanding and agreement between them, that B. should hold the latter sum, and also the sum of \$400, previously received, for the benefit of the grandchildren of A., (B's children) to be paid to them with interest. B. afterwards sold a farm to C., who was one of his children and grandchild of A., and agreed with him, that \$1000 of the purchase money should be allowed to stand in the farm as C's portion of the moneys A. had placed in B's hands. After the sale and conveyance of the farm, B. assigned to trustees for the benefit of his creditors all his property, including bonds, notes, *choses in action* and accounts, with power to sue for and recover the same. In an action brought by the trustees against C. to recover the \$1000, as an unpaid balance of the purchase money for said farm, it was HELD:
  - 1st. That the character of a trust was impressed upon the sum of \$400 by the agreement of B., to hold that amount for the same purposes for which he received the \$2000 from his father-in-law, viz., in trust for his children.
  - 2nd. That any contrariety between A's statements of the declarations of the trusts in his examination in chief, and in his cross-examination, were to be weighed by the jury, who were to determine how far his testimony was to be relied on. *Reiff, et al. vs. Horst*, 255.
2. M. being trustee under a decree of the Circuit Court of Baltimore City, and as such trustee having funds in his hands for investment, invested the same under the direction of said Court in a mortgage on property in Baltimore County. A note was given for the principal of said loan, and separate notes for the semi-annual instalments of interest to accrue during the period for which the principal was loaned. The mortgage was conditioned for the payment of said notes, as they severally matured, and provided for a sale of the

TRUSTS, TRUSTEES, CESTUIS QUE TRUST.—*Continued.*

mortgaged property by the mortgagee as trustee, upon any default in the conditions of the mortgage. Just before the principal of the mortgage debt fell due, the mortgagor sold the mortgaged property to the wife of M., subject to said mortgage; and to secure an extension for another year, M. endorsed a written guaranty of the principal sum, (or balance thereof,) and the interest semi-annually, stating in said guaranty that it was for the purpose of securing an extension for one year from maturity. Further indulgence was given from time to time until the 11th of February, 1878, when the principal not having been paid, the trustee in March, 1878, advertised the property for sale, and sold the same pursuant to said notice, and reported the sale to the Court. On exceptions to said sale, it was HELD:

- 1st. That an acceptance by the trustee after the 11th of February, 1878, of the interest which fell due on that day could not by implication be held to extend the time for the payment of the principal.
  - 2nd. That such extension was not effected by certain interviews between the trustee and M., not culminating in an agreement for extension. *Mahoney vs. Mackubin, &c.*, 357.
  3. In the first of said interviews the trustee demanded the payment of five thousand dollars of the principal to make the claim abundantly secure. Being importuned to withdraw that demand and indulge at least until the fall, he promised to see his *cestuis que trust*, and see what could be done, provided M. would at once go and have a certain policy of insurance assigned as collateral security, and would also pay the taxes unpaid and get receipt for the same deed, send him the written evidence of such payment and of such assignment by the following Monday morning. These demands were not complied with, and on the Monday morning, the trustee saw in the newspapers that M. had made an assignment for the benefit of his creditors, which fact had been concealed from him in the interviews referred to, notwithstanding the conveyance was made the day before the first interview.
- HELD:
- 1st. That the trustee was not only not bound by anything he had said to stay proceedings, but was fully justified in proceeding at once to advertise the property for sale.
  - 2nd. That the fact that the taxes of which payment was required although due, could not have been collected by distress at that time, did not affect the right of the

TRUSTS, TRUSTEES, CESTUIS QUE TRUST.—*Continued.*

trustee to demand their payment, as one of the conditions of the extension. *Id.*

4. The mortgaged property consisted of three parcels, all of which were advertised as adjoining, and each was not only specially described by reference to Liber and page of the Land Records of Baltimore County, but the property was described as the former residence of Mr. A., a prominent citizen, and also as adjoining the famous H. estate of Mr. J. M., and as being one-and-a-half miles west of C. station on the N. C. Railroad in the limestone valley of the Beaver dams. **HELD:**

That the description was more than usually full, and sufficient to give notice to any one wishing to buy such property where it was, and enable him to find it for examination. *Id.*

5. There had been rain in the morning but it was fair at the time of the sale. It cleared off before ten o'clock a. m. And the sale took place at one o'clock p. m. One of the witnesses stated that he had intended to go out and look at the property early that morning, but was prevented by the weather. It was not shown that he was wholly prevented from bidding by this fact, but that he was prevented by other considerations. **HELD:**

That taking all the proof together, the trustee did not appear to be reprehensible for not postponing the sale till another day. *Id.*

6. Upon consideration of the facts touching the manner in which the sale was conducted, and the sufficiency of time allowed for the bidding, it was **HELD:**

That there was no objection to the sale in this respect. *Id.*

7. It was also, upon a review of the testimony relating to the value of the property, and the price for which it was sold, **HELD:**

1st. That there was no ground for disturbing the sale upon the ground of inadequacy of price.

2nd. That there was nothing in the case to indicate any dereliction on the part of the trustee in regard to his duty to use his best efforts to effect a sale for the best possible price. And the price obtained for the property, which was very nearly the appraised value of it for the purpose of taxation, would not warrant the Court in attributing to him a failure to exercise reasonable discretion and reasonable endeavors to do justice by all his *cestuis que trust*. *Id.*

TRUSTS, TRUSTEES, CESTUIS QUE TRUST.—*Continued.*

8. By order of the Orphans' Court, O. as guardian of R. was authorized to loan to W. and D. a sum of money which as such guardian he had in his hands for investment, the same to be secured by mortgage on real estate. The loan was made to the parties named who as security therefor executed to O. an assignment of certain reversionary rights and interests in and to certain lots of ground in the City of Cumberland, said assignment being made to O. in his own name and without reference to his character as guardian. The loan was always treated and dealt with by O. as belonging to the estate of his ward, and he intended the assignment to be made to him as guardian, and neither he nor the other parties to it knew or understood that it was not so drawn, and made to express the real intention and object of the parties. After the recording of the assignment, certain judgments were recovered against O. upon one of which, rendered for a debt contracted subsequent to the recording of the assignment, an execution was issued, and levied upon the property assigned. Subsequent to the recovery of this judgment O. applied for the benefit of the bankrupt law, and obtained his final discharge thereunder. On a bill filed by R. after attaining his majority, praying to have the judgment creditors of O. restrained by injunction from proceeding by way of execution against the property embraced in the assignment, it was HELD:

1st. That as between R. and O. the former was entitled to relief either on the ground of mistake, or of a resulting trust.

2nd. That the judgment creditor of the trustee, whether he became such before or after the creation of the trust, in a case like the present, had no superior equity as against the property, to that of the *cestui que trust*, whether the conveyance be taken in the name of the trustee by mistake, or by design of the trustee, unaffected by any act or bad faith on the part of the *cestui que trust*.

3rd. That the Registry laws have no application to a case like the present.

4th. That sec. 23 of Art. 16 of the Code, had no manner of application to the case, the deed in question having been duly recorded within the time prescribed, and the creditors seeking to charge the property not being the creditors of the party making the deed, but of the party to whom the deed was made.

TRUSTS, TRUSTEES, CESTUIS QUE TRUST.—*Continued.*

5th. That no question could arise in the case under sec. 29 of Art. 24 of the Code, requiring an affidavit of the mortgagee to the *bona fides* of the consideration for the mortgage.

6th. That the discharge of O. under the Bankrupt law, in no way affected R's right to relief, as by sec. 5053 of the Revised Statutes of the United States, no property held by him in trust was allowed to pass to his assignee in bankruptcy. *Hartscock vs. Russell*, 619.

*See* LIMITATIONS, STATUTE OF, 3, 4, 5, 6.

## USURY.

In August, 1871, an arrangement was made by which the appellants were to obtain a loan for two years from the appellee, of the sum of thirty-seven hundred dollars, the same to be secured by mortgage. The mortgage was accordingly executed and delivered, the sum of two hundred and twenty-two dollars being retained by the mortgagee from the amount, to secure the payment of which the mortgage was given, as a *bonus* for the loan. In August, 1873, the time for the payment of the loan was extended, and the further sum of two hundred and sixty-two dollars, was demanded by the mortgagee, and paid by the mortgagors, as a condition of the continuance of the loan. In August, 1875, a like extension was made and the further sum of one hundred and thirty-one dollars, on a like condition, was demanded by the mortgagee, and paid by the mortgagors. Upon the expiration of the time for the re-payment of the loan, default was made, and the mortgaged premises were sold. **HELD:**

That the retention of the first named sum, and the demand and payment of the two other sums were usurious transactions, and in the distribution of the proceeds of the sale of the mortgaged premises, the mortgagors were entitled to have said sums credited upon the mortgage debt as of the times when they were respectively paid.

*Walter and Wife vs. Foutz*, 148.

*See* NATIONAL BANK, 1.

## VARIANCE.

*See* EVIDENCE, 6.

## VENDOR AND VENDEE.

*See* CONTRACT, 4, 5, 6, 7.

## VENDOR'S LIEN.

*See* OWELTY OF PARTITION, 1.



## WAIVER.

*See* ATTACHMENT, 6.

CONTRACT, 8.

EQUITY PLEADING.

INSURANCE, 8. 4.

TRUSTS, TRUSTEES, &C., 2.

## WARRANTY.

In an action to recover on a promissory note, given for a certain fertilizer, the Court instructed the jury as follows: 1st. "If the jury find from the evidence in this case, that the note upon which this suit is brought, was given for the fertilizer called 'Eureka,' and that the said 'Eureka' was bought by the defendant upon the representation of the plaintiff, or his agent, that said 'Eureka,' was a valuable fertilizer; and shall also find that the said 'Eureka' so sold to the defendant, if they find it was so sold, was valueless and worthless as a fertilizer, then the plaintiff is not entitled to recover." 2nd. "If the jury, however, find that the said 'Eureka' so sold to the defendant, was a valuable fertilizer, and possessed merit as such, then the plaintiff is entitled to recover." On appeal by the plaintiff, it was HELD:

That the Court sufficiently instructed the jury as to what they must find to constitute a warranty. *Crenshaw vs. Stys*, 140.

## WILLS, CONSTRUCTION OF.

1. A testator devised a farm to H. F. Z., in trust, (he being also sole executor of the will,) for the use and benefit of the testator's only son G. M. S.; provided, the latter would live on said farm and superintend its cultivation; but should he decline so to do, then the trustee should rent the farm as he might think best, and after paying all expenses, it should be optional with him whether to pay the balance of the proceeds to G. M. S., the son, or to divide it equally between the two daughters of the testator. And after bequests in trust to the two daughters of \$15,000 each, the testator proceeded to devise and bequeath to H. F. Z., as executor, or to his executors, administrators or assigns, *all the rest, residue and remainder* of his *estate*, real, personal and mixed, in trust, for the uses and purposes following, that is to say, that he, she or they should divide the said residue into three equal parts or shares, and that one of said shares should be distributed to, and held by, H. F. Z., his executors, &c., in trust for the sole use of the son, G. M. S., the trustee paying to the son, the rents and profits, upon his re-

WILLS, CONSTRUCTION OF.—*Continued.*

ceipt only. And after making devises and bequests of the other two parts or shares of such residue in trust for the daughters, this provision followed: "And in case of the death of my son George, or any one or both of my said daughters, *leaving children*, then in trust as to the principal of said three parts or shares of the residue of my estate, and *also in trust as to the aforementioned farm*, and aforesaid sums of \$15,000, for the *child or children* of such deceased son or daughter, *share and share alike, their heirs*, executors, administrators and assigns, as tenants in common; and in case of the decease of any child or children of my deceased son or deceased daughter or daughters under age, his, her or their shares shall be divided, among his, her, or their brothers and sisters, if any there be; and in further trust, that if either of my said children should die *without leaving child or children*, then that the entire interest in my estate of the son or daughter thus dying without issue, shall become the property of my surviving child or children, and of the children of such child or children, as shall remain, their parents being dead," &c., the same to be divided *per stirpes* and not *per capita*, and all to be held in trust as before directed. G. M. S., the devisee, declined to live on the farm according to the wish of his father, but the trustee, in the exercise of his discretion, allowed the son to receive the rents and profits as sole devisee. Some months after the death of the testator, a storm of wind blew down a quantity of timber growing on the aforesaid farm, and the same was converted into cooper stuff and fire-wood, and sold by the trustee. On a bill filed by G. M. S., claiming the net proceeds of the sales made by the trustee, together with all interest which the same might have earned from the time it was received by him, or a reasonable time thereafter, it was

## HELD:

- 1st. That the complainant took but an equitable life estate in the farm devised, subject to the condition and option therein mentioned; and if there were no children in being at the time of the devise, the devise to them operated by way of contingent remainder, which became vested upon the birth of the first child, subject to open and let in after-born children.
- 2nd. That to the extent of the amount of the net proceeds of sale realized for fire-wood, the complainant was entitled to the corpus of the fund, but as to the amount realized for the timber, he was entitled only to the inte-

WILLS, CONSTRUCTION OF.—*Continued.*

rest during his life. *Stonebraker vs. Zollickoffer, et al.*, 154.

2. A testator devised to his son the farm on which the testator dwelt, "upon condition that if my wife, M. L. W., should survive me, that he, my said son shall keep, provide for and support her during her natural life, and allow her to dwell and reside on said property with him and his family, free of expense during her life-time." On a bill filed by M. L. W., against the son and his grantee, it was HELD:

1st. That by said will the farm was charged with the burden of a reasonable support and maintenance of the complainant during her life.

2nd. That the purchaser of the land from the son took the same subject to this charge.

3rd. That the complainant being justified in leaving the house of her son, and seeking a home elsewhere, for the reason that he failed to provide her with reasonable and necessary support and maintenance, while she remained a member of his family, such as she was entitled to enjoy under the will, she was entitled to maintain her bill for the enforcement of the charge for her reasonable maintenance and support against the land in the hands of the grantee of the son. *Gardenville Permanent Loan Association vs. Walker*, 452.

3. At the time of the testator's death the land was subject to a mortgage, which the son paid with money borrowed from the G. P. L. Association. The old mortgage was released and a new mortgage was made to the G. P. L. Association to secure its said loan. Under a foreclosure of the latter mortgage, the mortgagee became the purchaser of the property. HELD:

That the G. P. L. Association was not entitled by subrogation to the benefit of the old mortgage for the purpose of diminishing the charge of the complainant against the land; but that it would be so entitled if instead of a release it had taken an assignment of said mortgage. *Id.*

4. It appearing that the rental value of the property was \$175, it was HELD:

1st. That the complainant was not entitled to the whole of this sum, but that the taxes and necessary repairs ought first to be paid out of the rent, and the allowance to her, even if it embraced the whole rental value of the land, would have to be abated to that extent.

WILLS, CONSTRUCTION OF.—*Continued.*

- 2nd. That \$150 per annum looking to the net rental value of the land, was a fair, just and reasonable allowance, and that the arrearages ought to be estimated on that basis. *Id.*
5. The will of W. J. dated the 29th April, 1848, and admitted to probate April 10th, 1849, contained the following clause: "First, I give and bequeath to my son B. the farm which I have lately purchased of G. W. D., containing one hundred and seventeen acres more or less, to hold the same only during his natural life, and after his death to fall to his son W. J., should he be living, to have the same, he and his heirs in their own proper right and behoof forever, but if the said W. J. should die without heirs, then I will and direct that the said farm be sold and the proceeds arising therefrom be equally divided among my four children or their heirs, viz., the heirs of A. J., deceased, C. C. J. F. and W. J., Jr., share and share alike; the share to which the said W. J., Jr. may be entitled to be equally divided between his two children F. and L. J. But it is my will and I hereby further direct that the said farm shall be, and I hereby charge it with the sum of twelve hundred dollars to be paid by my son B., or if he be dead, by his son J., to be paid in three equal annual instalments after my decease." **HELD:**
- 1st. That the Act of 1862, ch. 161, regulating the construction of certain doubtful expressions could not be resorted to in aid of the construction of this will which took effect and created vested interests in 1849.
- 2nd. That it was clear the testator meant to give to his son B., only a life estate, and that if on B's death the testator's son W. J. was living, he was to take an immediate fee; and if when the life estate ended W. was dead, but he had descendants living, they would take a fee, and that only on failure of both these contingencies at the death of the tenant for life was the attempted executory devise to take effect.
- 3rd. That the limitation over was upon the failure of *heirs generally*, which being an indefinite failure, could not be supported, no matter to what time such failure is supposed to refer, the life tenant's death, or the death of W. in the life-time of the tenant, or at W's death whenever it should occur. *James vs. Rowland*, 462.
6. The will of a testator contained the following clause: "Item second, I give and bequeath to my following named illegitimate sons by M. E. C. as follows: to H. C. C., A. C., and J.

WILLS, CONSTRUCTION OF.—*Continued.*

C., all my real and personal property to be equally divided among them, after reserving property enough to rent or hire yearly for the sum of one hundred and fifty dollars, for the support of M. E. C. during her life-time, or so long as she lives a life of a virtuous woman, and all my just debts are paid. I also make this provision in my will, that in case one or more, or all of the above named children should die before deceased shall arrive at the age of maturity, or after they have arrived at the age of maturity, and die without issue or lawful heirs, the property, both real and personal, belonging to the deceased one, to be equally divided among the other two surviving children; and in case that one more should die before he arrived of age, or without issue or lawful heirs, the surviving child to have all of the two deceased ones property, both real and personal; and I furthermore provide, that if all the children named in this will shall die without heirs, then the property contained in this will, I devise and bequeath to the heirs of John C. Estep, and the heirs of Margaret P. Shaw, to be equally divided among them, share and share alike." The will was dated the 6th day of August, 1861, and was admitted to probate on the 18th day of April, 1864. **HELD:**

- 1st. That the will must be construed without the help of the Act of 1862, ch. 161. The terms and expressions used in it must be understood in the sense which long usage and the decision of Courts had attached to them; and they could not be understood in a different sense which a statute had ascribed to them since the will was made.
- 2nd. That H. C. C., an illegitimate son of the testator who was alive at the time the will was made, having afterwards died, and another illegitimate son of the same name having been afterwards born, the latter could not claim directly under the will by virtue of the devise therein to H. C. C.
- 3rd. That the words used by the testator showed his intention to give each of his sons named in the will a fee, defeasible in *some* contingency; and the limitation over upon the happening of the contingency, was only good, if at all, as an executory devise.
- 4th. That the provisions of the Act of 1825, ch. 156, having changed the status of illegitimate children as to inheritable blood, "dying without issue," can no longer be restricted in their case to dying without heirs of the

WILLS, CONSTRUCTION OF.—*Continued.*

body, but must be construed when used respecting them precisely as if used with reference to persons born in wedlock.

5th. That the words "die without issue" or "without heirs," must be regarded as used in this will in their technical sense, there being no other words used to qualify their meaning.

6th. That the contingency upon which the limitation over was made to depend being an indefinite failure of heirs, the devise over was void, and the estate of the first taker became absolute.

7th. That H. C. C. was entitled to the real estate, he being the son of the testator and of the said M. E. C., and only heir-at-law of the survivor of the three devisees, his brothers. *Estep and Shaw vs. Mackey, et al.*, 592.

7. C. T. devised all his estate to E. T., his wife, for life, with power to dispose of the same among all or such of his "children, or their issue, in such manner and proportion, and for such term and estate as she shall think fit," the shares designed for his daughters to "be secured to them for life, free and clear of any control of their respective husbands, or without being liable to the payment of their debts, and after their decease, for the benefit of their children, and their legal representatives, in equal proportions, forever." In pursuance of this power, E. T., the wife, by will, disposed of the whole estate, dividing it into eight equal parts, giving one share in fee to each of the three sons, one share to trustees, in trust for each of two married daughters, and then devised one share to trustees, in trust, to permit each of the three unmarried daughters, during her natural life, to have, hold, &c., the same, and receive the rents, &c., thereof, free from the control of any future husband, and without being liable for his debts; "and from and immediately after the decease of" each, "then, *in trust*, that the said share shall become the estate of all" her children, to "be equally divided between them, their heirs," &c., "forever, as tenants in common, share and share alike;" and then provided that "in the event of the decease of any of her aforesaid daughters, without leaving any child or children, or descendants of such child or children," her or their share should "descend to, and be equally divided between, all" her "surviving children, and their respective representatives, as tenants in common, share and share alike." A son and three daughters, died unmarried and without issue; two sons and two daughters died, each

WILLS, CONSTRUCTION OF.—*Continued.*

leaving issue. A certain fund raised from real estate devised by C. T. and E. T., his wife, had been held in trust for L. an unmarried daughter, to whom the interest or income therefrom had been paid during her life. L. died leaving a will, whereby she devised and bequeathed the whole of her estate, save a small pecuniary legacy, to the children of a deceased brother. Upon a question as to the proper mode of distributing the fund which had been held in trust for L. it was HELD:

- 1st. That the devise by C. T. to his wife E. T. was for her life only; but by the power in his will he clothed her with authority to dispose of the remainder of the estate among all or such of his children, or their issue, in such manner and proportion, and for such term and estate as she might think fit.
- 2nd. That until this power was exercised, the reversion in the fee remained in the heirs-at-law of the testator; but when the power was executed by the will of the wife, the estates created thereby took effect in the same manner as if they had been created by the will which raised the power.
- 3rd. That the party taking under and by execution of the power, took under the donor, and in like manner as if the power, and the instrument executing it, had been incorporated in one instrument.
- 4th. That consequently, the estate created by the execution of the power, in trust, for the life of the daughter L., with remainder in fee to her unborn children, would, but for the estate limited to the trustees, have left the reversion in the heirs-at-law, of the donor of the power, dependent upon the event of L. having issue.
- 5th. That the devise by the mother in execution of the power, to two trustees and the survivor of them, and the heirs of the survivor, in trust, &c., for L., the daughter, taken in connection with other portions of the will as manifesting the intent, clearly vested the legal fee in the trustees and the heirs of the survivor; but it was a determinable fee, and, consequently as soon as the death of the equitable life tenant occurred, without having had issue to take the remainder, that event defeated and determined the estate in law conferred upon the trustees, and it became thence vested, by way of reverter, in the heirs-at-law of the original donor of the power.

WILLS, CONSTRUCTION OF.—*Continued.*

6th. That this estate thus becoming vested by way of reverter, could only be claimed by those who could, at the time of such reverter, show themselves to be heirs of the original donor of the power; the intermediate heirs of such donor not having been so seized as to render them new stocks of inheritance.

7th. That the fund in controversy must be distributed into four equal parts, according to the contention of the appellees, and not into six as contended by the appellant, that is, one-fourth part should be paid to the heir or heirs of each of the two sons and two daughters who died leaving issue. *Conner, Ex'rs. vs. Waring, et al.*, 724.

*See* TRUSTS, ACCEPTANCE OF, 1.

## WRIT OF ERROR.

*See* PRACTICE IN THE COURT OF APPEALS, 4.

*Ex. J. H. A.*







057-114

5







